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Guest Note

The New Pact on Migration and Asylum: why Pragmatism Cannot Engender Solidarity

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The Pact's grand ambitions

The significance of solidarity as a 'founding and existential value' of the Union and as 'the bedrock of the European construction' has been reiterated time and again.[1] The 2015 increased refugee movements to Europe and the failure of the EU and the Member States to respond in a coherent, fair and humane manner have exposed the CEAS inherent limitations[2] and have led to what has been termed as the European refugee crisis, and what has proved to be the Union's solidarity crisis.

In the aftermath of 2015, faced with a number of humanitarian challenges including the appalling reception conditions for asylum-seekers and refugees arriving on the Greek islands,[3] the European Commission appeared to acknowledge the myopic operationalization of solidarity over the past years. In September 2020, the Commission adopted the new Pact on Migration and Asylum which claims to pursue a 'humane' approach to migration and asylum with a focus on building trust amongst the Member States by closing the existing implementation gap.[4] EC President, von der Leyen, has stated that the proposed reforms reflect a 'pragmatic and realistic approach' taking 'many legitimate interests' into consideration and thus, striking 'a new balance between responsibility and solidarity.[5]
Solidarity features prominently in the Pact, as the main pillar for a fair, workable and sustainable EU migration system. Nonetheless, going beyond the rhetoric of solidarity requires an investigation of the considerations that have informed the Commission's proposals; an exposé of what is given priority to and what is let slide. In the following, I deconstruct the aforementioned ambitions of the Pact and ask to what extent the suggested reforms are likely to foster solidarity amongst the Member States.

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[1] See eg. Opinion of AG Bot in Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v. Council of the European Union* EU:C:2017:618 paras 17–19.
[2] See eg. M den Heijer, J Rijpma and T Spijkerboer, 'Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System', (2016) 53(3) Common Market Law Review 607.
[3] See CoE Commissioner's for Human Rights Letter to Margaritis Schinas and Ylva Johansson Ref: CommHR/DM/sf 008-2020, 9 March 2020.
[4] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum, COM/2020/609 final p. 2-3.
[5] Press statement by President von der Leyen on the New Pact on Migration and Asylum, 23 September 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1727

The underlying rationale of the suggested reforms

The Commission begins by pointing out the complexity of the phenomenon of migrant and refugee movements.[6] It is on this basis that the Pact prioritizes the coordination or else integrated policy-making[7] between the various aspects of migration, namely border management and screening, asylum and integration, return and relations with third countries. This is, essentially, a reiteration of the interconnection between the internal and external dimensions of EU migration and asylum policy and the fact that the latter is an essential component of the former.[8]

Second, the Commission underlines the limitations of the current Dublin system[9] focusing on the lack of a 'structured solidarity mechanism'[10]. Varying migration and asylum demands, according to the President of the Commission, call for collective yet varying contributions by Member States depending on geographies, capacities, and policy choices[11] (whatever that may mean). In light of this, the Pact aspires to build a system whereby responsibility in contributing to solidarity measures takes all these factors into account. Contrary to what the CJEU suggested in the Hungarian case, namely the indivisibility of the solidarity obligation,[12] the Commission seeks to reach a compromise that would remedy the existing 'one-size-fits-all' approach to solidarity.

In particular, the Commission introduces a 'predictable and reliable migration management system' of flexible solidarity contributions ranging from relocation of asylum seekers from countries of first asylum to returns of irregular migrants.[13] The system distinguishes between three different levels for contributions to be triggered: a) disembarkation following SAR operations,[14] b) pressure or risk of pressure[15] and c) crisis situations.[16] As regards disembarkation, solidarity contributions may take the form of relocation. In cases of pressure, Member States are free to choose amongst different options including return sponsorship and capacity building, and, finally, in times of crisis States shall choose strictly between relocation and return sponsorship. The Commission is granted the authority to decide, whenever necessary, what kind of re-adjustments (corrections) will have to be made so that the solidarity contributions pledged by Member States would be fit for purpose. In such cases, solidarity becomes compulsory by virtue of the exceptionality of the circumstances.

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[6] Communication on a New Pact (4) p 4.
[7] See European Commission, Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] COM/2020/610 final, p. 11.
[8] See e.g. European Council, The Stockholm Programme – an open and secure Europe serving and protecting citizens, OJ C 115/1, 4 May 2010, par. 6.2, 6.2.3 and European Council, Conclusions, 27 June 2014, para. 2, 5, 8.
[9] Communication on a New Pact (4) p 5.
[10] Proposal for a Regulation on asylum and migration management (n 7) p. 11.
[11] Press statement (n 5).
[12] Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v. Council of the European Union* EU:C:2017:631, para 291.
[13] Proposal for a Regulation on asylum and migration management (n 7) Part IV Solidarity, Articles 45-60.
[14] ibid, Articles 47-49.
[15] ibid, Articles 50-53.
[16] European Commission, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM(2020) 613 final.

Why the Pact if failing conceptually

The complexity of the phenomenon of human mobility is a welcome contention in the Pact. The distinction between 'economic' migrants and refugees has been questioned both descriptively and normatively for not capturing the reality of migration experience (mixed movements, overlap of displacement root causes) and for demonizing the movement for reasons linked to socio-economic deprivation. Extensive research has shown that mixed movements prove policies based on rigid distinctions between regularity and irregularity, untenable.[17] One would thus expect that the institution of asylum and border management/removal from the territory are kept distinct as permeated by diametrically opposite objectives. Instead, it is rather clear from the new proposals that the mixed character of migrant movements to Europe post-2015 is used by the Commission to precisely justify and reinforce the very distinctions that create the problem in the first place. In fact, the term 'mixed' bears a negative connotation pointing to persons unworthy of protection.[18]

By integrating mechanisms concerned with protection with border screening and return, the Pact normalizes a conflation between refugeehood and irregularity. Pre-screening procedures make further distinctions e.g. between groups of asylum-seekers based on nationality possible and even desirable in order to achieve speediness and efficiency.[19] In this context, the movement of refugees to and within Europe continues to be deemed as a 'threat' to the EU project on market integration and migration to Europe is framed as a collective action problem addressed through intensification of border management and cooperation with third countries.

Although containment and deterrence have given rise to a number of human rights violations on European soil over the last years,[20] the Commission's proposals have not moved away from migration control preoccupations. This is highly reflected in the way in which the system for allocating responsibility for refugees between EU states is organized. The rather symbolic move by the Commission to rename the reformed Dublin Regulation, 'the Asylum and Migration Regulation', does nothing to remedy the very point that nurtures the fundamental inequality at the heart of the CEAS, namely the first entry criterion, which remains intact. The new Regulation maintains the default position that the more geographically vulnerable a country is, the more responsibility it will bear. It is striking that the Commission does not consider the reverse consequences of such blame-based interpretation of responsibility allocation which has for years triggered a race to the bottom (divergence in recognition, status and rights attached to it). Instead, the new proposals continue to favour the default connection between external borders and responsibility alongside a cumbersome administrative bureaucracy, adopting compensatory solidarity

[17] See Michele Foster, 'Economic Migrant or Person in need of Protection?' in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Martinus Nijhoff Publishers 2016). See also Tendayi Achiume, 'Migration as Decolonization' (2019) 71 Stanford Law Review, 1509, 1512-1513.

[18] See Proposal for a Regulation on asylum and migration management (n 7) p. 10-11.

[19] Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 COM/2020/612 final.

[20] See, among others, Cathryn Costello 'Overcoming Refugee Containment and Crisis' (2020) 21 (1) German Law Journal, 17-22.

measures to tackle unevenness. Trust –on the basis of which solidarity is shown- is, therefore, reduced to a question of how well a country guards Europe's external borders and makes returns possible.

Why the Pact if failing principally

The Pact puts forward a proposal about an in-built flexible solidarity system, which will offer Member States a wide range of options for sharing responsibility. First, let us say that there is nothing wrong with flexibility as such. What is indeed controversial is the fact that the proposed system is heavily reliant on the Commission deciding which contributions will be considered proportional and appropriate, in case voluntary pledges are not sufficient. It becomes clear that the system does not advance determinate criteria on the basis of which solidarity will be 'measured'. This can hardly be conceived as a system whose effects will be predictable and in line with legal certainty. A number of questions are raised: What counts as a meaningful participation in sharing of responsibilities in financial and other terms? What kind of trade-offs will be legally acceptable in determining obligations? How is it guaranteed that no country is left alone in times of crisis if an agreement is not made as to what is fair and just? How does implicating the European Commission or any other EU institution in defining particular deliverables is different from the role the Council was tasked in the context of the never activated Temporary Protection Directive?[21] Arguably, we are moving from a majoritarian interpretation of solidarity to an authoritarian one.

In addition, flexibility in interstate relations and a 'new balance between responsibility and solidarity' seems to come at a cost: more coercion and commodification of asylum-seekers to be traded and transferred between the EU. Although solidarity as the guiding principle in the AFSJ is meaning to provide guidance for building a system which is fair towards third country nationals (Article 67 TFEU), the Pact seems to go to the opposite direction; it treats asylum-seekers as passive objects, directing those in need of protection towards countries they have not earlier considered as their final country of asylum and allowing for the possibility of those whose asylum application has been rejected to be transferred from one Member State to another in order for the latter to return them back to their country of origin (in the name of solidarity between the Member States). For such a system to work, it is first and foremost a matter of increasing the protection of rights and non-discrimination in the receiving states. Naturally, this is a costly enterprise which many European countries are not able to afford on their own nor are they incentivized to do so. In light of this, the language and function of solidarity (as relocation or return sponsorship) appears to be more of an *apology* for the Dublin rationale and less of an 'honest' assessment[22] and revision of an unfair system. It is also doubtful if it could contribute in a meaningful way to closing the existing implementation gap in so far as refugee preferences are not taken into account and the practicalities and politics of returns are taken for granted.

[21] The Directive was criticized for the absence of predefined commitments for solidarity. Reliance on the Council to agree on whether there exists a situation that qualifies as 'mass influx' was feared as a prolonged process to be avoided.

[22] European Commission, Press Release, A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity, Brussels 23 September 2020.

A pragmatic and principled approach: can we have it both?

The Pact has been the subject of extensive analysis[23] by commentators who, among others, agree that it is not really a fresh start but rather a repackaging of old 'tricks'. In the same vein, the challenges the new proposal raise from a human rights perspective have been flagged by leading experts and NGO's.[24] In terms of narrative, the Commission seems to be pursuing an impossible goal; the achievement of a pragmatic approach to migration and asylum i.e. one that is in line with the Union's internal market objectives which is, simultaneously, fair towards migrants and fair for all Member States. Supposing that fairness for Member States can be reconciled with fairness towards refugees, let us not forget that the Commission builds its proposals on a non-existing spirit of Union solidarity. As a matter of fact, the Pact is based on EU Member States' disagreement on solidarity. Although considerations of varying interests and asylum demands is a step to the right direction, solidarity in the Pact is not conceived in terms of advancing some determinate decisions but rather leaves the decision of particular means, targets, and optimal outcomes to be taken by the Commission or other centralized administrative bodies at a future time; a solidarity dependent on bureaucratic discretion.

It is worth noting, here, that there is a delicate line between 'pragmatism'[25] and compromise. In some matters, there may reasonably be one best, most pragmatic solution. For example, it really may be a fact that a compulsory solidarity scheme based on fixed criteria will increase certainty and reliability on the system. Yet, there may be a lack of consensus over the means used to achieve this solution. In this case, seeking a compromise becomes itself the goal as 'the most pragmatic solution'. As suggested earlier, there is no clear answer to the question of how much should a Member State spend on capacity building in third countries in order for this contribution to be considered proportionate compared to relocation. In a case like this, being pragmatic means seeking compromise without considering that a principled approach is sacrificed. It will be interesting to see where the Commission will draw the line. In the new proposals, though, it is safe to argue that solidarity is framed primarily as a matter which Member States need to reach a compromise as best as possible and less as a question that implicates particular EU law obligations and fundamental rights where compromise is only a last resort.

The above indicate that hiding behind a 'pragmatic approach' the Commission evades objections at a meta-level. How is the future of the CEAS envisioned and what do we want solidarity to achieve? The Pact puts forward a series of normative arguments, affirming some form of consequentialism on the one hand and value grounded insights on the other. Unfortunately, 'pragmatism' does not magically resolves contradictions nor does it reconcile competing interests. These questions require reimagining the EU as a legal construct, solidarity and unity of its peoples, and its form of governance in a different way. As I have argued elsewhere, restoring mutual trust between EU states requires restoring faith to institutions. European asylum law and policy is bound to fail engendering solidarity if they

[23] See the special series of posts on the New Migration Pact at the Odysseus Network blog http://eumigrationlawblog.eu/series-on-the-migration-pact-published-under-the-supervision-of-daniel-thym/
[24] See relevant contributions at the ASILE FORUM https://www.asileproject.eu/df_the-new-eu-pact-on-migration-and-asylum/
[25] On pragmatism see eg. the work of Richard Rorty, Richard A. Posner, Hilary Putnam, Russel B. Goodman.

do not create the conditions where all those who are involved (or subjected to EU law) participate in EU legal processes of integration.[26] In the words of Banakar 'its [solidarity's] viability at the transnational level remains ultimately a function of its efficacy at the micro level of EU citizens',[27] and non-citizens as the case of asylum policy indicates.

[26] For a more detailed analysis, see Eleni Karageorgiou, *Rethinking solidarity in European asylum law: A critical reading of the key concept in contemporary refugee policy*, PhD thesis, Lund University, 2018.
[27] Reza Banakar, 'Law, Love and Responsibility: A Note on Solidarity in EU Law' in R. Banakar, K. Dahlstrand and L. Ryberg Welander (eds), *Festskrift till Håkan Hydén*. Lund, 2018, p. 2.

HORIZONTAL DIRECT EFFECT OF THE CHARTER IN EU LAW: RAMIFICATIONS FOR THE EUROPEAN ECONOMIC AREA

GRAHAM BUTLER* & MARIUS MELING†

In a consistent line of jurisprudence, the Court of Justice of the European Union (CJEU) has now stated that, as a last resort, provisions of the EU Charter of Fundamental Rights (the Charter) can have horizontal direct effect. More specifically, this possibility occurs when a provision of the Charter has been given specific expression to from a directive. Whilst it has long been the case that directives in themselves continue to not have horizontal direct effect in EU law, there is no doubting that the horizontal direct effect of provisions of the Charter, which in turn are given specific expression to from a directive, is increasingly being found. This possibility of horizontal direct effect of the Charter is of striking significance for European Economic Area (EEA) law for two reasons. Firstly, there is no doctrine of direct effect in EEA law according to the European Free Trade Association (EFTA) Court; and secondly, the Charter is not incorporated into EFTA pillar of EEA law in any way. Given the potential for the widening divergence between EU law and EEA law on the existence of horizontal direct effect of the Charter when given specific expression to from a directive, with a homogeneity gap opening up, this article considers the ramifications for the EEA of such advances in EU law, and proposes some solutions for how these EU legal developments can be responded to within EEA law.

1 INTRODUCTION

Argument and debate concerning the horizontal direct effect of EU law are as old as the hills. However, new developments, such as the potential of horizontal direct effect of the EU Charter of Fundamental Rights (the Charter), when given specific expression to from a directive, represent an opportunity to understand these changes brought on by a line of case law from the Court of Justice of the European Union (CJEU), but also, in turn, see how they will have an impact on EEA law, and the jurisprudence of the European Free Trade Association (EFTA) Court. In a string of recent cases such as *Egenberger*,[1] *Bauer*,[2] and *Cresco Investigation*,[3] and others, the CJEU has confirmed that horizontal direct effect of the Charter is possible in EU law, when a provision of the Charter is given effect to, or given specific expression to from a directive. The horizontal direct effect of the Charter has long been

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[1] Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, ECLI:EU:C:2018:257.
[2] Case C-569/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871.
[3] Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi*, ECLI:EU:C:2019:43.

predicted to be a possibility,[4] and such a prediction is now seeing its validation on a case-by-case, article-by-article basis.

These developments in the case law of the CJEU will not only have an effect on the manner in which EU law is applied in EU Member States,[5] but rather, it will also have ramifications that extend to EEA law, as applied in Iceland, Liechtenstein, and Norway – the three EFTA states applying the EEA Agreement, at least as far as directives are concerned. Why horizontal direct effect of the Charter in EU law, when given specific expression to from a directive, is of particular interest to EEA law is that the issue of direct effect, more generally, which has long been a feature of EU law, is not completely straightforward, because direct effect is not a doctrine in EEA law. Instead, the main remedy for individuals in EEA law is state liability, as confirmed by the EFTA Court in *Sveinbjörnsdóttir*,[6] which has mimicked the initial *Francovich* doctrine from EU law.[7] With this new line of case law from the CJEU that has allowed for the horizontal direct effect of the Charter when given specific expression to from a directive, this has in turn reduced the value of the doctrine of state liability in EU law as a remedy; which by contrast in EEA law, is *the* main remedy.

In EU law, direct effect and state liability are distinctly separated measures, providing different solutions to what is often the same problem – the effectiveness of EU law (or lack thereof) within EU Member States. Direct effect allows a non- or incorrectly implemented EU provision to take precedence over conflicting national law in a given situation; whilst state liability affords the possibility for compensation provided by the state towards those who have suffered a loss as a consequence of the state's failure to comply with the provisions in question. With the horizontal direct effect of the Charter, when given specific expression to from a directive now coming into place as a result of new CJEU case law, this reduces the state liability doctrine in EU law to a mere safety net, when other remedies cannot come into play.

Prior to this recent jurisprudence in EU law, case like *Egenberger* and others would have been solved in EU law through state liability, thus making the applicable EU Member State liable for not fulfilling its obligations under EU law to properly implement a directive. In confirming that provisions of the Charter may have horizontal direct effect when given specific expression to from a directive, such a turn in the CJEU case law potentially places the consequences of non- or incorrectly implemented directives onto private actors, as opposed to EU Member States. By contrast, there is no horizontal direct effect in EEA law, and EEA law is exclusively dependent on state liability as the main remedy to ensure the effectiveness of EEA law, which is a major difference from the role of state liability in EU law.

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[4] For this perspective, see, Xavier Groussot, 'Direct Horizontal Effect in EU Law after Lisbon – The Impact of the EU Charter of Fundamental Rights on Private Parties' in Patrik Lindskoug and others (eds), *Essays in Honour of Michael Bogdan* (Juristförlaget 2013).

[5] For extensive analysis of horizontal effect of fundamental rights, see, Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (Oxford University Press 2019); Sonya Walkila, *Horizontal Effect of Fundamental Rights in EU Law* (Europa Law Publishing 2016).

[6] Case E-9/97, *Erla María Sveinbjörnsdóttir v Iceland*, Advisory Opinion (Judgment) of the EFTA Court, 10 December 1998.

[7] Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, ECLI:EU:C:1991:428.

This article sets forth the premise that with the possibility of horizontal direct effect of the Charter in EU law, when given specific expression to from a directive, which *de facto* gives selective horizontal direct effect of directives (but not the directives themselves, but rather by way of the Charter, which can have horizontal direct effect), EFTA states applying the EEA Agreement have a varied form of fundamental rights protection, with a lower form of protection when compared to EU Member States, given the CJEU's new line of jurisprudence. Thus, with a potential higher level of protection afforded to individuals and economic operators in EU Member States, this poses significant issues for EEA law, which strives for a homogenous application of the internal market framework and accompanying law. Accordingly, this article considers the ramifications this new strand of CJEU case law has on EEA law, given two distinct differences between EU law and EEA law – firstly, the absence of the doctrine of direct effect; and secondly, the formal absence of the Charter in EEA law.

Five modest options are set forth with regard to what can be done in EEA law about these new constitutional developments in the EU legal order. Option 1 considers continuance of state liability in EEA law without direct effect, following the limited interpretation of state liability in EU law, without doing anything regarding direct effect, thus widening the gap between EU law and EEA law. Option 2 contemplates extending the doctrine of state liability to cover situations where there is direct effect in the EU legal order, making the EFTA state further liable in EEA law than would otherwise be for Member States in EU law. Option 3 envisions the EFTA Court affirmatively embracing the Charter in EEA law, and opening up for horizontal direct effect of the Charter when it is given specific expression to from a directive, in the same manner that the CJEU has recently been doing in EU law. Option 3 would therefore be maintaining full homogeneity and equivalent rights protection between EU law and EEA law. Option 4 anticipates the EFTA Court doing nothing at all, and continue to allow the gap between EU law and EEA law grow larger, thus not giving due consideration to the principle of homogeneity in EEA law. Lastly, option 5 would see the national legal orders incorporate fundamental principles of EU law arising from the Charter, and apply them as national law, without the involvement of EEA law. As this article contends, these are the most likely, but by no mean definitive outcomes within EEA law that will be seen in the future.

The article is structured as follows. Section 2 sets the doctrine of direct effect in EU law, and how horizontal direct effect of different EU legal instruments are understood. Section 3 then goes on to examine the most recent case law of the CJEU that has confirmed, in certain circumstances, the horizontal direct effect of the Charter, when given specific expression to from a directive. Section 4 elaborates on how direct effect has been handled in EEA law, and the way in which it has been interpreted by the EFTA Court, in addition to analysing the doctrine of state liability as the main remedy in EEA law. In light of the differences between EU law and EEA law that become apparent from the analysis contained in sections 2, 3, and 4, the following section 5 discusses how the recent developments in EU law concerning the potential for the horizontal direct effect of the Charter, when given specific expression to from a directive, would be handled as a matter of EEA law. Five different options are therefore contemplated for how EEA responds to such developments in EU law. Section 6 thereafter evaluates the various options that should be considered by

actors in the EEA legal order, before section 7 concludes with some closing observations and reflections on the relationship between EU law and EEA law in the future.

2 DIRECT EFFECT AND HORIZONTAL DIRECT EFFECT IN EU LAW

In a broad sense, the doctrine of direct effect means that provisions of EU law that are sufficiently clear, precise, and unconditional to be considered justiciable can be invoked and relied on by individuals before national courts. Vertical direct effect concerns the rights that an individual has against an EU Member State, while horizontal direct effect is when an individual has a right or an obligation against another individual. As far back as when the doctrine of direct effect (at least as regard provisions of the EU treaties) was uncovered in *Van Gend en Loos*, the horizontal dimension of the doctrine of direct effect was already foreseen. As put by the CJEU, EU law 'not only imposes obligations on individuals but is also intended to confer upon them rights',[8] even if horizontal direct effect was not relevant to the case at hand.

The difference between vertical and horizontal direct effect may be the 'classic' way to frame the direct effect saga in EU law,[9] yet it is an important one. Despite the prominence of the doctrine of direct effect in EU law, the case law on the horizontal direct effect with regard to EU primary law is rather minimal in nature. Only select provisions have been given such treatment by the CJEU, such as in *Defrenne II*,[10] *Angonese*,[11] *Martínez Sala*,[12] and *Viking Line*.[13] The main centre of interest on direct effect in EU law, therefore, has been on direct effect of EU secondary law, namely and in particular, directives. The doctrine of direct effect was extended to cover directives in vertical situations in *Van Duyn*,[14] but left open the horizontal aspect of the doctrine. This is because such horizontal application of the doctrine posed much more difficult questions for how EU law was to be effective in EU Member States, and how remedies were to be ensured.[15]

The distinction of vertical and horizontal direct effect of directives, and whether the latter was possible, later arose in *Marshall I*,[16] where the CJEU found that a directive in itself may not impose obligations on individuals. This was the beginning of the CJEU's long-standing answer to the questions surrounding horizontal direct effect of directives, which

[8] Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1, p.12.
[9] Takis Tridimas, 'Black, White, and Shades of Grey: Horizontality of Directives Revisited' (2001) 21 Yearbook of European Law 327, 328.
[10] Case C-43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, ECLI:EU:C:1976:56 ('*Defrenne II*'), in Article 157 TFEU.
[11] Case C-281/98, *Roman Angonese v Cassa di Risparmio di Bolzano SpA*, ECLI:EU:C:2000:296, on Article 45 TFEU.
[12] Case C-85/96, *María Martínez Sala v Freistaat Bayern*, ECLI:EU:C:1998:217, on Article 18 TFEU.
[13] Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:772, on Article 49 TFEU.
[14] Case C-41/74, *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133, para 7.
[15] For a thorough background, see, Deirdre Curtin, 'The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context' (1990) 15 European Law Review 195.
[16] Case C-152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, ECLI:EU:C:1986:84 ('*Marshall I*').

was 'famously',[17] and affirmatively – no. According to the CJEU, since directives were specifically addressed to the Member States, these could not impose obligations on individuals. Notably, the Opinion of the Advocate General in *Marshall I* stated that 'horizontal direct effect would totally blur the distinction between directives and regulations'.[18] This point, effectively endorsed by the CJEU by denying horizontal direct effect of directives, has remained a factor and thus reappeared as grounds for reasoning in later cases.[19] Several Advocates General have taken an alternative view of Advocate General Slynn and the CJEU since,[20] but to no avail of changing the CJEU's perspective, and the lack of horizontal direct effect of directives, in themselves, has remained the stated position of the CJEU. The reasons that have been offered by the CJEU through its extensive case law that there should be no horizontal direct effect of directives is that directives are only binding on those to whom it is addressed, the Member States; that it prevents those Member States from opportunistically not implementing a directive; that the lack of horizontal direct effect maintains the distinction between regulations and directives; and that legal certainty dictates a consistent position of the CJEU.[21] Recently in *Smith*, the CJEU again repeated its mantra on the lack of horizontal direct effect of directives in themselves.[22] Yet that did not mean that there was no horizontal direct effect in EU law, as this had been known to be possible since *Defrenne II* with regard to provision of EU primary law. There, it was stated that Article 157 TFEU on the prohibition on gender discrimination also applies to the relationship between individuals, and not just against states or functions operating as the state.[23] Therefore, horizontal direct effect of EU law was potentially possible, but under uncertain circumstances. As a result, as a general rule, the question of horizontal direct effect was not a question of *whether* it was possible, but *when* it was so.

In *Egenberger*, *Bauer,* and *Cresco Investigation*, and subsequent cases, a noted shift occurred in regard to the horizontal direct effect in EU law, not as a result of the CJEU changing its view itself, but because of the effect of the Charter, when given specific expression to from a directive. This is in line with the long-standing position that if horizontal direct effect of directives was to be denied, then it was 'imperative to consider other possibilities [that EU] law offers by way of alternative remedies'.[24] Horizontality of EU law, today, comes in many ways. The horizontal application of direct effect turns the addressee of a directive from just the state, however widely drawn, to being pointed at everyone in an indiscriminate fashion.

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[17] Robert Schütze, 'Direct Effects and Indirect Effects of Union Law' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law*, vol 1: The European Union Legal Order (Oxford University Press 2018), 279.

[18] Opinion of Advocate General Slynn, Case C-152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, ECLI:EU:C:1985:345 ('*Marshall I*'), 734.

[19] For example, in Case C-91/92, *Paola Faccini Dori v Recreb Srl*, ECLI:EU:C:1994:292.

[20] Opinion of Advocate General Van Gerven, Case C-271/91, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority*, ECLI:EU:C:1993:30 ('*Marshall II*'); Opinion of Advocate General Jacobs, Case C-316/93, *Nicole Vaneetveld v Le Foyer SA and Le Foyer SA v Fédération des Mutualités Socialistes et Syndicales de la Province de Liège*, ECLI:EU:C:1994:32; Opinion of Advocate General Lenz, Case C-91/92, *Paola Faccini Dori v Recreb Srl*, ECLI:EU:C:1994:45; Opinion of Advocate General Sharpston, Case C-413/15, *Elaine Farrell v Alan Whitty and Others*, ECLI:EU:C:2017:492.

[21] Case C-201/02, *The Queen, on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions*, ECLI:EU:C:2004:12, para 56.

[22] Case C-122/17, *David Smith v Patrick Meade and Others*, ECLI:EU:C:2018:631, para 42.

[23] Case C-43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, ECLI:EU:C:1976:56 ('*Defrenne II*').

[24] Sacha Prechal, 'Remedies After Marshall' (1990) 27 Common Market Law Review 451, 473.

Through the Charter, but upon reliance on a directive, which gives certain rights under the Charter specific expression, is a new way in which horizontal direct effect is manifesting itself in EU law. In EU law, the question is no longer on *whether* the Charter is horizontally applicable, but on *which* parts of the Charter are capable of having horizontal direct effect.

3 HORIZONTAL DIRECT EFFECT OF THE CHARTER IN EU LAW

General principles entail horizontal direct effect.[25] In *Egenberger*, the CJEU concluded that the prohibition of discrimination on grounds of religion is a general principle of EU law. In the case at hand, the prohibition in Article 21(1) of the Charter, according to the CJEU, 'is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law'.[26] The rules have to be able to confer rights on individuals on its own and this is a condition for it to be able to have horizontal direct effect.[27] The CJEU reiterated national courts are obliged to disapply any contrary provision of national law in a dispute between two individuals.[28] The most remarkable aspect of *Egenberger* was its claim of equating a general principle of EU law and the Charter. The CJEU said the 'prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law', and '[t]hat prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law'.[29] This claim, effectively meant that the provision of the Charter had horizontal direct effect.

The *Egenberger* judgment did not touch upon Article 51 of the Charter because the matter in question was a general principle of EU law – prohibition of all discrimination grounds of religion or belief. As put, the CJEU 'disregard[ed] the Explanations on the Charter'.[30] Article 51 of the Charter stands the potential to be circumvented by the finding of general principles of EU law.[31] The prior judgments of *Mangold* and *Kücükdeveci* explain this, both before and after the entering into force of the Charter. The former, *Mangold*, a general principle was uncovered on foot of a directive, and was found to be a part of the 'constitutional traditions common to the Member States'.[32] *Kücükdeveci* cleared up some of

[25] On the general principles of EU law, see, Katja S Ziegler, Violeta Moreno-Lax and Päivi Johanna Neuvonen (eds), *Research Handbook on General Principles of EU Law* (Edward Elgar 2021); Takis Tridimas, *The General Principles of EU Law* (Second Edition, Oxford University Press 2006); Xavier Groussot, *General Principles of Community Law* (Europa Law Publishing 2006).

[26] Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, ECLI:EU:C:2018:257, para 76.

[27] ibid, para 78.

[28] ibid, para 82.

[29] ibid, para 76.

[30] Elise Muir, 'The Horizontal Effects of Charter Rights given Expression to in EU Legislation, from Mangold to Bauer' (2020) 13 Review of European Administrative Law 185.

[31] Maciej Szpunar, 'The Authority of EU Law: The Case of Horizontal Application of Fundamental Rights' in Wolfgang Heusel and Jean-Philippe Rageade (eds), *The Authority of EU Law: Do We Still Believe in It?* (Springer 2019), 129.

[32] Case C-144/04, *Werner Mangold v Rüdiger Helm*, ECLI:EU:C:2005:709, para 74.

Mangold's loose ends,[33] by more affirmatively bringing Article 21 of the Charter into the equation of the general principle.[34] Yet it should be noted that Article 51 of the Charter itself does not exclude horizontality. As put by the CJEU itself, Article 51(1) of the Charter 'does not…address the question whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility'.[35]

After *Egenberger* was the *Bauer* case. The question at hand did not concern discrimination, but nonetheless demonstrated that horizontal direct effect of the Charter covered some aspects, in this case, social rights. The Advocate General in *Bauer* suggested that the Charter had horizontal direct effect, without the need for a directive to give it specific expression. As put, 'the adoption of an act of secondary EU law and/or implementing measures by the Member States may certainly be useful to allow individuals to benefit in practice from the fundamental right concerned….[but]…[t]hat said, the adoption of such measures, which is not required by the wording of the relevant provision of the Charter, is not necessary in order for that provision directly to produce its effects in disputes which must be resolved by national courts'.[36] Pre-*Bauer*, such an approach to the Charter without the content of a directive giving the Charter specific expression had been called 'normatively unclear and methodologically unsound'.[37] This was potentially one reason why the CJEU did not follow the Advocate General explicitly.

Rather in *Bauer*, the CJEU insisted that the directive be present in order to establish horizontal direct effect of the Charter. Paid annual leave for heirs in the directive at hand, both in the public and private sector, was found to be a general principle of EU law. The case established a right for workers to receive paid annual leave as an 'essential principle of EU social law', and a corresponding obligation on the employer to grant periods of paid leave.[38] In one way, *Bauer* was 'a solid constitutional proclamation of rights'.[39] The Charter therefore applied as a constitutional guide for courts to strive towards when interpreting national law in the light of the relevant provision of the Charter, adding additional weight to the directives in question.

The last of the three cases demonstrable as a matter of EU law in this article is *Cresco Investigation*. Here the CJEU confirmed that prohibition on discrimination on grounds of

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[33] *Mangold* was not well received in all quarters. Even the most favourable readings from outside of the CJEU criticised lack of rigour in terms of the reasoning offered. See, Takis Tridimas, 'Horizontal Effect of General Principles: Bold Rulings and Fine Distinctions' in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer Law International 2013).

[34] Case C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG.*, ECLI:EU:C:2010:21.

[35] Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871, para 87.

[36] Opinion of Advocate General Bot, Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:337, para 83.

[37] Takis Tridimas, 'Fundamental Rights, General Principles of EU Law, and the Charter' (2014) 16 Cambridge Yearbook of European Legal Studies 361, 368.

[38] Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871, para 90.

[39] Eleni Frantziou, '(Most of) the Charter of Fundamental Rights Is Horizontally Applicable: ECJ 6 November 2018, Joined Cases C-569/16 and C-570/16, Bauer et Al' (2019) 15 European Constitutional Law Review 306.

religion was a general principle in EU law.[40] Specifically, it said that 'until the Member State concerned has amended its legislation…in order to restore equal treatment',[41] the private actor must comply with the effect of Article 21 of the Charter, as also contained in a directive, for which national courts are 'obliged to guarantee individuals the legal protection afforded to [persons] under Article 21 of the Charter and to guarantee the full effect of that article',[42] even against private actors. Therefore, the provision of the Charter in question, given specific expression to from a directive, did indeed have horizontal direct effect. By stating this, the CJEU found that the employee shall have the right and payment they were entitled to from the employer, and not compensation from the state. This moved the financial responsibility from the state to the employer.

Whilst these new waves of Grand Chamber judgments of the CJEU were handed down in relation to the Charter, they also were with regard directives that had to be implemented in Member States. Cumulatively therefore, what is evident from this new strand of case law is that directives in themselves are not being given direct effect, but rather, the horizontal direct effect of the Charter, when had been given specific expression to from a directive. This new strand of case law demonstrates that the typical understanding of non-horizontality in EU law is slowly being eroded, even if this new strand of case law is being based upon the Charter. As noted in *Egenberger*, 'the national court would be required to ensure within its jurisdiction the judicial protection for individuals flowing from…the Charter, and to guarantee the full effectiveness of those articles'.[43]

In all, the CJEU is giving horizontal direct effect to some provisions[44] of the Charter when given specific expression to from a directive. Despite warnings about the downsides of giving horizontal direct effect to provisions of the Charter,[45] the CJEU has gone ahead and proceeded to do so. These cases, amongst others that have followed, mark the opening of a new chapter on horizontal direct effect. The way that it has been dealt with by the CJEU does not distort the distinction between the regulations and directives that was of concern back in *Marshall I*, but the Charter certainly has made the horizontal direct effect of EU law more salient.

The Charter plays into and dictates how directives are interpreted in the EU and this case law on directives is infused with Charter-related references. Many of the directives interpreted by the CJEU in EU law in these cases are also relevant to EEA law. This will make it increasingly harder for the EFTA Court to distinguish the rules deriving from the directives and the rules deriving from the Charter. The main risk in EEA law, therefore, is what is occurring regarding directives that are given specific expression in a Charter

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[40] Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi*, ECLI:EU:C:2019:43.

[41] ibid, para 89.

[42] ibid, para 78.

[43] Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, ECLI:EU:C:2018:257, para 79.

[44] For example, Article 27 of the Charter has shown to not have direct effect, given that a directive did not give it sufficient expression. Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others*, ECLI:EU:C:2014:2 ('*AMS*'), paras 41-51. That said, a future directive could very well result in a change in the CJEU's approach.

[45] See, Dorota Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38 European Law Review 479.

provision. Given the directive stands alone in EEA law without the Charter, this gives rise to unequal protection of fundamental rights in the EFTA pillar of the EEA.

4 DIRECT EFFECT AND STATE LIABILITY IN EEA LAW

Other than when the horizontal direct effect of the Charter is found possible through specific expression to from a directive; the other possible remedy for individuals and economic operators when an EU Member State fails in their obligations to correctly implement directives is through the doctrine of state liability. The doctrine allows the possibility for individuals and economic operators to receive compensation for breaches of EU law, which was introduced by the CJEU in *Francovich*,[46] along with applicable conditions, which have later been subject of its own nuances and clarifications. Before this, it was solely up to the EU Member State to provide protection and compensation for such violations. With *Francovich*, this shifted, ensuring that the EU Member State, when certain conditions occur, are liable to compensate losses for individuals and economic operators that have occurred when it, a Member State, has not fulfilled its obligations under EU law.

The increased and broader scope of horizontal direct effect of the Charter, when given specific expression to from a directive, demonstrated in *Egenberger, Bauer,* and *Cresco Investigation* has changed and minimised the scope of state liability in EU law, which gives preference to potential horizontal direct effect *before* state liability. Whilst this enhances the material effectiveness of EU law in EU Member States, this development is not without problems. Whilst related, direct effect and state liability are two different solutions to what is often the same problem. For direct effect, the rule that the EU Member State has failed to implement or has not correctly implemented a directive will be adequately dealt with by CJEU, ensuring the effectiveness of EU law in some way; while for state liability, the rule does not take effect, which the EU Member State instead gets punished for, leaving individuals and economic operators to be able to claim compensation for their lack of correct implementation of the rule. However, whilst direct effect and state liability are solutions to what is often the same problem, they can be disconnected. As the CJEU stated in *Brasserie du Pêcheur*, fulfilment of the conditions for state liability in EU law is not dependent on the fact that the conditions for direct effect are present.[47] In some cases, these conditions will coincide, but they cannot be treated as being the same. As put, state liability appears as a safety net, where other devices fail.[48]

An old-age debate in EEA law concerns the potential of both direct applicability and direct effect of EEA law.[49] *Opinion 1/91* expressed the CJEU's fears that direct effect in EEA law, as then merely envisaged, would be absent. Specifically, it said that the EEA Agreement

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[46] Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, ECLI:EU:C:1991:428.

[47] Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, ECLI:EU:C:1996:79, paras 19-22.

[48] Sacha Prechal, 'Member State Liability and Direct Effect: What's the Difference After All?' (2006) 17 European Business Law Review 299-316, 301.

[49] On the differences between direct applicability and direct effect more generally as a matter of EU law, see, J. A. Winter, 'Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law' (1972) 9 Common Market Law Review 425-438.

was 'without recognizing the principles of direct effect',[50] and that the EFTA states applying the EEA Agreement were to merely revise their national laws to give such law effect. Thirty years later, these fears still hold true, in that EU-style direct effect is not present in EEA law. To date, the EFTA Court's attitude to direct effect has been called 'flexible',[51] because nothing is ruled affirmatively in or out. However, it is evident from a line of rulings that the EFTA Court interprets the law before it as opportunities to ensure, in some way, that EEA law is given as much effect as possible within the confines of the EEA legal framework.

All the way back as far as *Restamark*,[52] the EFTA Court's first case, it was established what has later been referred to as 'quasi-direct effect'. This entails that once a provision has been implemented into the legal orders of the EFTA state, it can be relied upon by individuals and economic operators.[53] Post-*Restamark*, the issue on direct effect in the EEA law was once again addressed by the EFTA Court in *Sveinbjörnsdóttir* and *Karlsson*.[54] In the former, the EFTA Court stated that Article 7 EEA and Protocol 35 does not entail 'a transfer of legislative powers' and continued by stating that 'EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA-rules before national courts'.[55] Therefore, the EFTA Court rejected direct effect, for which actors could not rely on non- or incorrectly implemented directives in national courts of EFTA states. Notwithstanding this however, state liability in EEA law was confirmed, and was not contingent upon recognition of a corollary doctrine of direct effect.[56] The EFTA Court continued noting that according to the objectives of the EEA Agreement, national courts shall consider any relevant element of EEA law, implemented or not, when interpreting national law.[57]

By confirming that EEA law is a 'distinct legal order of its own',[58] a striking parallel to the CJEU's *Van Gend en Loos*, the EFTA Court took the EEA Agreement to a new level of understanding. At the same time however, the EFTA Court was a little cautious, and drew a vague outer limit to the effect of EEA law, noting that 'the depth of integration' of the EEA Agreement for EFTA states was less far-reaching than under the EU treaties for EU Member States.[59] With this, the EFTA Court made it clear that the EEA Agreement had proceeded the limits and intentions set by the EFTA states that entered into the EEA Agreement. This qualification of the state liability doctrine in EEA law would naturally have consequences if

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[50] *Opinion 1/91*, Opinion of the Court, ECLI:EU:C:1991:490, para 27.

[51] Maria Elvira Méndez Pinedo, *EC and EEA Law: A Comparative Study of the Effectiveness of European Law* (Europa Law Publishing 2009) 152.

[52] Case E-1/94, *Ravintoloitsijain Liiton Kustannus Oy Restamark*, Judgment of the EFTA Court of 16 December 1994.

[53] Catherine Barnard, 'Reciprocity, Homogeneity and Loyal Cooperation: Dealing with Recalcitrant National Courts?' in EFTA Court (ed), *The EEA and the EFTA Court: Decentred Integration* (Hart Publishing 2014) 154.

[54] Case E-9/97, *Erla María Sveinbjörnsdóttir v Iceland*, Advisory Opinion (Judgment) of the EFTA Court, 10 December 1998, para 63.

[55] Case E-4/01, *Karl K. Karlsson hf. v The Icelandic State*, Judgment of the EFTA Court of 30 May 2002, para 28.

[56] ibid, para 27.

[57] ibid, para 28.

[58] Case E-9/97, *Erla María Sveinbjörnsdóttir v Iceland*, Advisory Opinion (Judgment) of the EFTA Court, 10 December 1998, para 59.

[59] ibid.

EU law were begin to develop in other directions. One of these directions is the horizontal direct effect of the Charter, when given specific expression to from a directive.

After *Sveinbjörnsdóttir* in *Karlsson*, the EFTA Court clearly stated that direct effect and state liability can be, and are separated in EEA law, given that direct effect of directives is not possible.[60] Yet going beyond *Sveinbjörnsdóttir*, it further extended the doctrine of state liability and made it clear that state liability was a vital part of EEA law, covering not just non- or incorrectly implemented directives, but also, in situations more generally when a states has 'breache[d]…its obligation under EEA law'.[61] Later however, the developments in state liability in EEA law have not totally followed the same doctrine in EU law. For example, in *HOB-vin*, the EFTA Court stated that the development of the doctrine of state liability, whilst integral to EEA law, differed from the case law on the same doctrine from the CJEU,[62] implying that the application of doctrine might not necessarily be coextensive in all respects.[63] *HOB-vin* thereby suggests that the EFTA Court finds that the doctrine of state liability has a more central position and important rule in EEA law than it does in EU law.

5 HORIZONTAL DIRECT EFFECT OF THE CHARTER: IMPLICATIONS AND OPTIONS FOR EEA LAW

With the Charter now being further operationalised in the EU and its Member States, there has been a shift in emphasis from adjudication of *economic* rights to *fundamental* rights integration, with the Charter a new instrument of choice by individuals seeking to rely upon it. Given the predominance of state liability in EEA law (Section 4), and the newly-found horizontal direct effect of the Charter in certain circumstances, such as when given specific expression to from a directive (Section 3), this gives rise to the pertinent question, and flowing questions therefrom: what would happen if the same events that occurred in *Egenberger*, *Bauer*, or *Cresco Investigation* happened in one of the EFTA states that applies the EEA Agreement? Would there be a clear breaking point between EU law and EEA law where the EFTA state would be held liable, as opposed to in EU where horizontal direct effect of the Charter was applied? Alternatively, would such events result in the extension of the scope of state liability in the EFTA states? Such questions result in a number of considerations for EEA law, given these new developments in EU law. In this section, five options are presented and discussed as a way to demonstrate the strengths and weaknesses regarding the different possibilities for EEA law.

To illustrate why the developments in the EU legal order on horizontal direct effect need to be considered in EEA law can be illustrated using the *Bauer* case. If the circumstances in those cases would have occurred in an EFTA state applying the EEA Agreement, with that EFTA state not having implemented the rules correctly, it would, according to EEA law

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[60] Case E-4/01, *Karl K. Karlsson hf. v The Icelandic State*, Judgment of the EFTA Court of 30 May 2002, paras 25-34.

[61] ibid, para 32.

[62] Case E-2/12, *HOB-vín ehf. v Áfengis- og tóbaksverslun ríkisins*, Judgment of the EFTA Court of 11 December 2012, para 120.

[63] Halvard Haukeland Fredriksen, 'The EFTA Court and the Principle of State Liability: Protecting the Jewel in the Crown' in EFTA Court (ed), *The EEA and the EFTA Court: Decentred Integration* (Hart Publishing 2014) 333-334.

and judicial practice at the EFTA Court, not be resolved through horizontal direct effect of Charter provisions, despite having specific expression given to such from a directive. In such a hypothetical situation in an EFTA state, the go-to remedy would be state liability. This, it is submitted, is a divergent approach in how EU law and EEA law applies different means to rules that ultimately stemmed from the same directive. Therefore, in time, this would lead to even-greater homogeneity divergence, and a problem for the viability of EEA law as a sufficient solution to EFTA states latching onto the internal market, without the EFTA states being EU Member States. If EEA law is not meant to cover and protect individuals and economic operators in the same way as EU law does on an equivalent matter, then, at very least, this should be addressed in some way. There is no shortage of options.

5.1 OPTION 1 FOR EEA LAW – NARROWER CONCEPTION OF STATE LIABILITY

The first option in EEA law would be for the EFTA Court to follow state liability in the same way as the CJEU does, but not include cases covered by direct effect at the CJEU. This would be a very narrow interpretation of the doctrine of state liability. This would, in essence, be the same as the conditions for state liability in EU law that began to be developed from *Francovich*. But where the rule on state liability is 'the safety net when other mechanisms fails' in the EU,[64] it is the only available remedy for individuals in the EFTA states. The upside to this option this would be the fact that state liability is interpreted uniformly throughout both the EU and the EEA. This would ensure the same application and interpretation of the doctrine, which will mean that there is no need to differentiate between the two legal orders.

However, giving effect to the same exact rule and scope of the rule, does not, in this instance, mean that the same result is achieved. By having the same rules on the doctrine of state liability, legal homogeneity is actually not created, as the EU has additional tools to cover breaches beyond state liability, which the EEA does not. Without direct effect in the EEA, the coextensive application of the rules surrounding the doctrine of state liability rules will leave open a gap, offering less protection in the EEA than in the EU, which again is not in line with the principle of homogeneity that underpins EEA law.[65] As analysed above, state liability in the EEA is not dependent on the application of state liability in EU law. This option would mean that there is less protection for individuals in EEA law, and that the EFTA states could neglect the rights of individuals and economic operators.

Adapting this narrow point of view of the doctrine of state liability in EEA law, without including the other mechanism of direct effect, would be a huge loss for individuals

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[64] Sacha Prechal, 'Member State Liability and Direct Effect: What's the Difference After All?' (2006) 17 European Business Law Review 299, 309.

[65] On another divergence between the two legal orders is what constitutes a referring body for the purposes of the preliminary reference procedure under Article 267 TFEU by the CJEU, versus the a referring body for the purposes of the advisory opinion procedure under Article 34 SCA by the EFTA Court. See, Graham Butler, 'Mind the (homogeneity) gap: Independence of referring bodies requesting advisory opinions from the EFTA Court' (2020) 44 Fordham International Law Journal. This is all the more serious in light of the *Banco de Santander* judgment of the CJEU, delivered in Grand Chamber in January 2020. See, Case C-274/14, Proceedings brought by Banco de Santander SA, ECLI:EU:C:2020:17. Graham Butler, 'Independence of Non-Judicial Bodies and Orders for a Preliminary Reference to the Court of Justice' (2020) 45 European Law Review 870.

and economic operators. This solution would ultimately set the legal development of the EEA back in time. In the current legal climate, where individuals are typically offered a higher degree of protection in EU law, this option in EEA law is unwise, and unlikely to be a real solution.

5.2 OPTION 2 FOR EEA LAW – WIDER CONCEPTION OF STATE LIABILITY IN EEA LAW

The second option for EEA law would be for the EFTA Court to extend the applicability of state liability to cover the situations solved in the EU legal order through the horizontal direct effect of the Charter, when given specific expression to from a directive. This would not necessarily mean that it would be an extension of the state liability as a whole, but that the scope of the doctrine of state liability would remain similar to the manner in which it is currently applied. By opting for this approach, the EFTA Court would move in the opposite direction to the CJEU case law and the effects of its new horizontal direct effect jurisprudence, which results in situations where there will be fewer cases at the CJEU solved through the doctrine of state liability.

This option would be in compliance with the assumed position of EFTA states applying the EEA Agreement, whom may wish to continue to be held accountable under state liability, rather than to have horizontal direct effect be possible for individuals and economic operators. By adopting a wider conception of state liability, this would form a clear distinction between EU law and EEA law, especially given that when it comes to that the obligation to transpose relevant directives into national law, the obligation falls solely on the state, leaving a higher expectation on EFTA states applying the EEA Agreement to perform implementation duties than there is for EU Member States.

A wider conception of the doctrine of state liability may form in such a way that all breaches are covered, marking an objective interpretation where each and every breach by the state is sufficiently serious to constitute a breach. This would mean that the EFTA Court would have to further distance itself from the interpretation of the doctrine by the CJEU, something that the EFTA Court began doing in *HOB-vin*,[66] to that extent and this makes it clear that the terms of state liability can exist side-by-side, but that the condition for establishing a breach is sufficiently serious is different.[67]

This option would furthermore imply that the remedies for breaches according to the EEA Agreement would, *de facto*, be stricter and harsher on the EFTA state than a similar breach for an EU Member State. However, this would at least offer a higher degree of protection for individuals and economic operators, and would keep in line with the proposition that the state is responsible for fulfilling its obligations, and that this obligation should not be transferred to individuals and economic operators. This solution would be consistent with the views of the Advocate General in *Cresco Investigation*,[68] where the point was raised that employers should not bear the cost of a state's failure to comply with its

[66] Case E-2/12, *HOB-vín ehf. v Áfengis- og tóbaksverslun ríkisins*, Judgment of the EFTA Court of 11 December 2012.

[67] ibid, para 120.

[68] Opinion of Advocate General Bobek, Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi*, ECLI:EU:C:2018:614, para 183.

obligations, since the employers are just following national law. Shifting the cost over to the individuals that are just following the national law is a problematic side to horizontal direct effect, and makes it less likely for the state to have to bear the cost of their failure to comply with EU rules.

Two further issues arise if this option is to be seriously considered as an adopted approach in EEA law. First is the consideration of whether EFTA states applying the EEA Agreement should be more exposed and cover more situations in EEA law than EU Member States in a comparative situation in EU law. Secondly, this option would also, in practice, give anyone but the state the opportunity to take advantage of the failure to imply the directives correctly, which could then create an opportunistic and unwanted side effect.

If the EFTA Court decides to widen the scope of state liability in EEA law, distinguishing it from state liability in the EU, the question would then be what the best way of doing this would be. The obvious and most likely option would probably be to build on and extend the findings of the EFTA Court in *HOB-vin,*[69] lowering the degree of seriousness of the breach to be either all breaches; or alternatively, alter the way of interpreting what it means for a breach to be 'sufficiently serious'.[70] If this option would be adopted in EEA law, the approach ought to be that all breaches are 'sufficiently serious', but having an exception for abusive behaviour. This option would therefore, in essence, create strict liability for the EFTA state in given situations.

5.3 OPTION 3 FOR EEA LAW – HORIZONTAL DIRECT EFFECT OF THE CHARTER

The third option for EEA law would be for the EFTA Court to introduce horizontal direct effect of the Charter in EEA law, when a provision of the Charter in question has been given specific expression to from a directive. This would be applying the legal sources in the same way as the CJEU does with respect to the Charter provisions. In essence, this would be adopting an effects-based approach to EEA law, and ensuring homogeneity between EU law and EEA law. As argued, state liability, in itself, can 'never be a substitute for…the application of…direct effect'.[71] Rather, it can be seen as a complementary doctrine. Therefore, for the doctrine of direct effect to make it into EEA law, it would first need to be established by making regulations directly applicable, which is in line with the CJEU's view of EEA law.[72]

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[69] Case E-2/12, *HOB-vín ehf. v Áfengis- og tóbaksverslun ríkisins*, Judgment of the EFTA Court of 11 December 2012.

[70] Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, ECLI:EU:C:1991:428, para 40. For an overview of the conditions for liability, and the subsequent clarification of *Francovich* in EU law, see, Robert Schütze, *European Union Law* (Second edition, Cambridge University Press 2018) 421-427.

[71] Leif Sevón, 'The ECJ, the EFTA Court and the national courts of the EFTA countries' in Peter Lødrup and others (eds), *Rettsteori og rettsliv: Festskrift til Carsten Smith* (Universitetsforlaget 2002) 730.

[72] Case C-431/11, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, ECLI:EU:C:2013:589, paras 53-54; and, Case C-83/13, *Fonnship A/S v Svenska Transportarbetareförbundet and Facket för Service och Kommunikation (SEKO) and Svenska*, ECLI:EU:C:2014:2053, para 24. On this, see, Tarjei Bekkedal, 'Understanding the Nature of the EEA Agreement: On the Direct Applicability of Regulations' (2020) 57 Common Market Law Review 773.

EEA law itself does not have a prescriptive catalogue of fundamental rights in the same way that EU law does. But that is not to say that fundamental rights are absent from EEA law altogether. The EFTA Court incorporates fundamental rights under the European Convention on Human Rights (ECHR) into its case law,[73] and has said the provisions of the ECHR and the judgments of the European Court of Human Rights (ECtHR) are 'important sources for determining the scope of…rights'.[74] This has been further extended in *Holship* to confirm that '[f]undamental rights form part of the unwritten principles of EEA law',[75] and that such rights '*guaranteed in the EEA legal order* are applicable in all situations governed by EEA law'.[76] The EFTA Court, however, was not explicit about which rights are guaranteed, and did not rule out such *guaranteed* rights in EEA law being the Charter itself. That said, it has been argued that with fundamental rights being unwritten principles of EEA law, this would extend only to the ECHR, as EFTA states applying the EEA Agreement are contracting parties to that,[77] and not, *per se*, the Charter.

The EFTA Court has not, thus far, been keen on using the Charter in its adjudication more generally. The Charter is not a part of EEA law, and does not have formal legal status, but it would not be correct to say it has no legal value in EEA law. There is a way in which the *effects* of the Charter could come into EEA law, without the Charter necessarily being part of EEA law. Directives that are a 'Text with EEA Relevance' are interpreted by the EFTA Court, with some of these directives having preambles which may reference to the Charter. Consequently, in the EFTA Court's adjudication, it would be strange if the EFTA Court did not at least look to the Charter to assist it in the adjudication process.[78] As forcefully put, it would be 'unclear how the EFTA Court could simply ignore such recitals'.[79] And whilst it may be perceived, at least in some quarters, as 'a not so straightforward substantial judge made amendment to the EEA Agreement',[80] it is nonetheless accepted that it is 'awkward' if the EFTA Court acts 'as if the Charter did not exist, completely ignoring its provisions and the [CJEU]'s case law related to it'.[81] Furthermore, it can be argued that it might even be

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[73] For example, Case E-8/97, *TV 1000 Sverige AB v The Norwegian Government represented by the Royal Ministry of Cultural Affairs*, Advisory Opinion (Judgment) of the EFTA Court of 12 June 1998, para 26. Generally, Robert Spanó, 'The EFTA Court and Fundamental Rights' (2017) 13 European Constitutional Law Review 475.

[74] Case E-2/03, *Ákæruvaldið (The Public Prosecutor) v Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson*, Judgment of the EFTA Court of 12 December 2003, para 23.

[75] Case E-14/15, *Holship Norge AS v Norsk Transportarbeiderforbund*, Judgment of the EFTA Court of 19 April 2016, para 123.

[76] ibid, emphasis added.

[77] David Thór Björgvinsson, 'The EEA Agreement and Fundamental Rights' in Lucius Caflisch and others (eds), *Liber Amicorum Luzius Wildhaber: Human Rights – Strasbourg Views, Droits de l'homme – Regards de Strasbourg* (NP Engel Verlag 2007) 40.

[78] Beyond directives, there is also the issue of regulations. For example, the General Data Protection Regulation (GDPR) (2016/679) in the preamble relies on the Charter. Interpretation of the GDPR is currently before the EFTA Court. Joined Cases E-11/19 and E-12/19 *Adpublisher AG v J & K*, pending.

[79] Nils Wahl, 'Unchartered Waters: Reflection on the Legal Significance of the Charter under EEA Law and Judicial Cross-Fertilisation in the Field of Fundamental Rights' in EFTA Court (ed), *The EEA and the EFTA Court: Decentred Integration* (Hart Publishing 2014) 288.

[80] Arnfinn Bårdsen, 'Fundamental Rights in EEA Law – The Perspective of a National Supreme Court Justice' (Spring Seminar, EFTA Court, Luxembourg, 12 June 2015)., para 21.

[81] ibid, para 22.

warranted that the EFTA Court rely explicitly in its adjudication on the Charter, facilitating a more honest approach to its reasoning. The case of *DB Schenker* can shed some light on how the Charter might function in EEA law. Here, the EFTA Court said that the principle of homogeneity 'cannot be restricted to the interpretation of provisions whose wording is identical in substance to parallel provisions of EU law'.[82] Consequently, therefore, this can serve as an established premise for the EFTA Court to use the Charter, despite the Charter not being a core component of EEA law.

The EFTA Court has acknowledged the potential effect of the Charter in both *Posten Norge*[83] and *Clauder*,[84] but the ECHR still appears to be the baseline, as evidenced in *Jabbi*.[85] In *Clauder*, passing reference was made to seeing the ECHR and the Charter as corresponding. Here, the EFTA Court stated that a provision of the ECHR was 'the same right' protected in the Charter.[86] This, whilst admirable in attempting to ensure fundamental rights protection in the EEA,[87] does not fully resolve the issues. Whilst seeing rights correspondence between the ECHR and the Charter, the EFTA Court has thus far not addressed rights correspondence between a directive and the Charter. That said, the *Clauder* judgment does leave it open to the EFTA Court in the future to expand on this iteration, should it choose to do so. Around the same time in *ESA v Iceland*, the Charter coming into EEA law could have occurred. However, the EFTA Surveillance Authority (ESA) and the Norwegian Government pleaded that it was not relevant to the case.[88] By contrast, Iceland did see that it was to be a matter of relevance.[89] Notwithstanding the disagreement between the parties on the relevant of the Charter, it was not dealt with in the EFTA Court's judgment.[90]

More interesting is the EFTA Court's utterances in *Deveci*, where the parties differed on whether the Charter could be invoked or not. As a get-around, the EFTA Court avoided the issue. It stated that in the case, it 'finds no reason to address the question…of the Charter',[91] and that the provision of the Charter in question 'must be recognised in accordance with EEA law and national law and practices'.[92] This position does not rule out the horizontal direct effect of the Charter when given specific expression to from a directive in the future, despite the EFTA Court not taking up this opportunity in this instance. Therefore, if a provision in the Charter offers the same level of protection as it is offered in

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[82] Case E-14/11, *DB Schenker v EFTA Surveillance Authority*, Judgment of the EFTA Court of 21 December 2012, para 78.

[83] Case E-15/10, *Posten Norge AS v EFTA Surveillance Authority*, Judgment of the EFTA Court of 18 April 2012.

[84] Case E-4/11, *Arnulf Clauder*, Judgment of the EFTA Court of 26 July 2011.

[85] Case E-28/15, *Yankuba Jabbi v The Norwegian Government, represented by the Immigration Appeals Board*, Judgment of the EFTA Court of 26 July 2016, para 81.

[86] Case E-4/11, *Arnulf Clauder*, Judgment of the EFTA Court of 26 July 2011, para 49.

[87] Similar efforts by the EFTA Court are seen in Case E-15/10, *Posten Norge AS v EFTA Surveillance Authority*, Judgment of the EFTA Court of 18 April 2012, paras 84-86.

[88] Case E-12/10, *ESA v Iceland*, Report for the Hearing, paras 89 and 163.

[89] ibid, paras 92 and 125.

[90] Case E-12/10, *ESA v Iceland*, Judgment of the EFTA Court of 28 June 2011.

[91] Case E-10/14, *Enes Deveci and Others v Scandinavian Airlines System Denmark-Norway-Sweden*, Judgment of the EFTA Court of 18 December 2014, par 64.

[92] ibid.

the ECHR, using the Charter to understand the ECHR, is 'unproblematic'.[93] However, where levels of protection differ between the Charter and the ECHR come about is where problems arise. The ECHR in some instances covers the same matters as the Charter, but usually, the Charter offers a higher level of protection for individuals and economic operators when it is in play. The EFTA Court can, and may, invoke the Charter in cases before it.

5.4 OPTION 4 FOR EEA LAW – DO NOTHING

The fourth option separates itself from the first three, because it does not require any actions from the EFTA Court. On the contrary, it means it does nothing at all. If the EFTA Court chooses not to address the difference in the application of state liability in the EU law and EEA law following the introduction of horizontal direct effect of the Charter when given specific expression to from a directive, and just watch as the gap between EEA law and EU law grow larger, this could lead to a point where it is impossible to tell what the rules for individuals and economic operators are. This might, unfortunately, be the most likely solution in the short term.

The full scope of horizontal direct effect of the Charter, when given specific expression to from a directive, has not yet been made clear by the CJEU, with the cases thus far only covering few provisions of the Charter. The CJEU has been reluctant in making clear statements that applies outside of the specific articles that arose in the cases to date, in light with its policy of judicial minimalism. With a new and undecided area, it might be wise of the EFTA Court to wait until there is a higher degree of clarity on the area from the CJEU, which will come over time, in what is a fluid area of case law. This might be the preferred solution, as the situation currently implies that it does not create any problems either for the states, individuals, and economic operators; but by looking at the possible negative outcomes of not acting, it can also be stated that this should not be a long-term or permanent solution.

Doing nothing would ensure that the EEA legal order is an inferior constitutional arrangement, and thus no longer filling the premise which supports the existence of the EEA Agreement, which is the homogeneity of EEA law with EU law. In time, this would lead to the EEA framework becoming an untenable platform for integration of the EFTA states into the internal market. To not do anything leaves EEA law in a place it does not want to be, because it does not provide clear answers that individuals and economic operators need to make sure that their rights are protected within the internal market. With the complicated relationship between EU law and EEA law being what it is, it needs to be made clear where the line between them goes, and without a clear answer from the EFTA Court, there is no way of knowing what the applicable law would be.

5.5 OPTION 5 FOR EEA LAW – NATIONAL APPROACHES TO FUNDAMENTAL RIGHTS

The final option would be seeing national approaches to horizontal direct effect of the Charter, when given specific expression to from a directive, which can be distinguished from the other options in the way that it is not an effort undertaken by the EFTA Court. Rather,

[93] Wahl (n 79) 294.

it would be made by EFTA states applying the EEA Agreement themselves, without the involvement of the EFTA institutions. To some extent, this option is already occurring in Norway. This option works as a workaround for the states when it comes to discrimination. Norway is using the provisions of the Charter and the judgments of the CJEU to form and interpret national law to be in compliance with the EU rules on discrimination. This gives individuals and economic operators the assurance that national law is, at the very least, on par with those in EU law. This is, interestingly, a way that national courts in EFTA states would be avoiding EEA law.

This option might also be beneficial for Norway, as the EFTA state has sufficient room if and when a problem will occur. For example, for an instance where the Norwegian courts disagree with the CJEU, the apparent question is whether the national court is going to follow the CJEU's ruling, regardless of disagreements; or alternatively, if the national court would create its own interpretation, and applying the law as it would see fit. The EFTA states are not limited to just follow rules arising from the EEA Agreement, from it does not restrict states from applying other rules, so long as such rules do not 'jeopardi[s]e the attainment of the objectives of the agreement'.[94] Accordingly, the Norwegian rules on discrimination are tailored to cover all areas of discrimination covered by the Charter in EU law. Such national laws on discrimination are designed to implement the Charter, even without being a party to the Charter, making clear that Norwegian law is more suitable to solve problems on discrimination than the unclear and unsettled EEA law. Taking this approach, Norway is having it both ways, as it is able to apply law in a way that cannot be pursued by the ESA, or challenged at the EFTA Court.

In this approach, where the EFTA states applying the EEA Agreement are not formally bound by the Charter, this national approach can, in some ways, be seen as the optimal way an EFTA state to ensure uniformity with EU law. This raises questions regarding the loyalty of such an EFTA state, given that it is partially acting outside of the EEA Agreement. When one of three EFTA states applying the EEA Agreement chooses to go outside the EEA system to solve a rather large and complex problem, the two remaining states are left with the two options of either following in the same footsteps; or alternatively, not doing anything, and having no way of assuring that national law is followed, thus leaving their individuals and economic operators at risk. Moreover, there is no certainty that the national laws that are adopted are fully covering the Charter, and this kind of approach makes the homogeneity gap wider, and much more unpredictable.

The legal certainty and possibility of individuals and economic operators of having a case tried at a court beyond the state, such as the EFTA Court, is one of the main arguments for why a national approach is suboptimal. When dealing with EU law, following the interpretations of the CJEU, it is certainly problematic that individuals and economic operators in EFTA states applying the EEA Agreement cannot have their cases heard by the EFTA Court that decides on the matter as a matter of EEA law; compared to individuals and economic operators in a comparative position in EU law at the CJEU. Having a case solved by a national court of an EFTA state interpreting EU law and the jurisprudence of the CJEU, without consequential ramifications for incorrect interpretation, is an unwise

[94] Article 3, second paragraph, EEA Agreement.

approach. Without a supervisory authority such as the ESA, and an independent judicial body, the EFTA Court, this approach is incisively deficient.

6 CONTEMPLATING THE WAY AHEAD FOR THE EUROPEAN ECONOMIC AREA

The Charter is no mere symbolic document, for it is a rights-conferring instrument that, as several judgments of the CJEU have now made clear, can now be invoked horizontally in a given set of legal conditions. Without the Charter, the EFTA states applying the EEA Agreement are lacking an important source of law to establish horizontal direct effect of the Charter when given specific expression to from a directive, as there can be in EU Member States. In those EFTA states, the ECHR does not have the same kind of significance as EU law, and nor does the ECHR possess the same constitutional character as the Charter. EEA law therefore needs to undergo some sort of reform if wants to survive and keep connection to EU law, with the most important aspect being the continued access of EFTA states applying the EEA Agreement to the internal market of the EU. The new direction of CJEU case law on horizontal direct effect of the Charter, when given specific expression to from a directive, opens up a new constitutional conundrum for EEA law. Consequently, the EEA legal order is soon reaching its day of reckoning. The EFTA states applying the EEA Agreement do not wish to be part of the EU legal order, but yet, want access to the internal market of the EU. As put, this dual dynamic demonstrates that EFTA states having been trying to 'have their cake and eat it'.[95]

The Charter has, to date, not become a major part of EEA law. Accordingly, the EFTA Court, as acknowledged by an insider, 'has been cautious as regards the relevance of the Charter'.[96] This was initially a wise position, given that there was some initial uncertainty as to the potential scope of horizontal direct effect arising from the Charter in EU law. Horizontality of the Charter in EU law was previously contemplated,[97] and despite the wavering in *AMS* case, the CJEU did not exclude it, but subsequent case law like *Egenberger*, *Bauer*, and *Cresco Investigation* have now all pointed to horizontal direct effect of the Charter when given specific expression to from a directive. The slowly evolving problem is that the norm was typically that there was no horizontal direct effect of directives, which continues to be the case. However, now, if a provision of a directive is replicated in the Charter, that Charter provision may, as a last resort in EU law, be invoked horizontally, if a directive has given specific expression to it.

Critics stand to criticise many of the options that have been put forth above. According to one view, 'highly sophisticated legal acrobatics…[would be needed]…to arrive at…[a]…conclusion that the protection of fundamental rights within the EEA…[that]…is equivalent to…the ECHR'.[98] This statement alone, albeit about the *Bosphorus* presumption

[95] Skúli Magnússon, 'Efficient Judicial Protection of EEA Rights in the EFTA Pillar – Different Role for the National Judge?' in EFTA Court (ed), *The EEA and the EFTA Court: Decentred Integration* (Hart Publishing 2014) 130.

[96] Carl Baudenbacher, *Judicial Independence: Memoirs of a European Judge* (Springer 2019) 154.

[97] Tridimas, 'Fundamental Rights, General Principles of EU Law, and the Charter' (n 37) 392.

[98] David Thór Björgvinsson, 'On the Interplay between EC Law, EEA Law and the European Convention on Human Rights' in Martin Johansson, Nils Wahl and Ulf Bernitz (eds), *Liber Amicorum in Honour of Sven*

of convention compliance of the EU with the ECHR, as applied to the EEA, is just one demonstrable view of how difficult these matters are from a legal perspective, even without the Charter in the picture. But the evolving case law of the CJEU on the Charter, which is now squarely within the frame, matters are even more complex for EEA law.

It should also be stated that the options offered in this article are by no means exhausted, for there are other varied versions of each of these put forward that could also act as solutions. Yet the continued homogeneity of developments across EU law and EEA law is clearly at issue. As put, 'if the two courts [the CJEU and the EFTA Court] give different interpretations to a provision of [EU] law…that is identical in substance, [then the principle of] homogeneity would clearly be at stake'.[99] The preamble to the EEA Agreement envisages a 'dynamic and homogeneous' area. Given that if the questions asked in *Egenberger*, *Bauer*, and *Cresco Investigation* had come before the EFTA Court first, and not the CJEU as it did, it is likely, given the EFTA Court's jurisprudence thus far, that it would have reached a different conclusion than what the CJEU did.

On this basis, as argued above, it is clear that *something* has to be done in EEA law to correct this problem. It has been claimed that despite the fact there is no direct effect in EEA law, there are still remedies available given that state liability achieves 'essentially the same results'.[100] This, whilst may have been a correct claim for the time, is no longer the case. The results, in light of the new CJEU case law, are no longer the same. State liability in no way makes up for having the ability to rely upon direct effect, and the way horizontal direct effect of the Charter is now possible when given specific expression to from a directive. Therefore, the question in EEA law is *what* to do, and not *if* something should be done.

The solution that should be avoided at all cost is the first option (narrower conception of state liability). This is because this would create a gap between EU law and EEA law, offering individuals and economic operators in EFTA states applying the EEA Agreement a lot less protection, creating a position that cannot be sustained. State liability, and the possibility for it to be found, is still a live issue in EU law. Some Member States national laws make it incredibly difficult for state liability to be established in national legal orders. The Commission has recently proceeded with infringement proceedings case against a Member State to the CJEU for failing to provide sufficient access to such a remedy,[101] implying that the doctrine of state liability in EU law is still salient and developing, notwithstanding the potential of horizontal direct effect of the Charter when given specific expression to from a directive. Furthermore, as already indicated, the fourth (do nothing) and fifth options (national approaches to fundamental rights) are unhelpful for securing homogeneity of EU

Norberg: A European for All Seasons (Bruylant 2006) 98. This comment was made as regards the *Bosphorus* presumption of convention compliance of the EU with the ECHR as *not* applying to the compliance of the EEA with the ECHR. This view was confirmed in the *Konkurrenten.no* decison by the ECtHR. *Konkurrenten.no AS v Norway* (Application no. 47341/15), EctHR, Second Section, 28 November 2019. For criticism of *Konkurrenten.no*, see, Halvard Haukeland Fredriksen and Stian Øby Johansen, 'The EEA Agreement as a Jack-in-the-Box in the Relationship between the CJEU and the ECtHR?' [2020] European Papers.

[99] Sevón (n 71) 728.

[100] Carl Baudenbacher, 'If Not EEA State Liability, Then What? Reflections Ten Years after the EFTA Court's Sveinbjörnsdóttir Ruling' (2009) 10 Chicago Journal of International Law 333, 368.

[101] Case C-278/20, *Commission v Spain*, pending.

law and EEA law, and would be detrimental to rights for individuals and economic operators in EFTA states applying the EEA Agreement.

This leaves just two options, which are the two best alternatives for EEA law, and are in the hands of the EFTA Court. These are to either the second option (wider conception of state liability in EEA law), or the third option (horizontal direct effect of the Charter). Introducing direct effect as a whole, starting with regulations, could be a solution, but the most likely outcome will be to extend the scope of state liability, the second option. This would not offer similar solutions to similar problems, but it would be in line with the *sui generis* view of EEA law offered by the EFTA Court in *Sveinbjörnsdóttir*, and would provide individuals and economic operators with some protection, although placing a higher burden on the EFTA state applying the EEA Agreement, given that it would become liable in more instances than an EU Member State would in comparable circumstances. Alternatively, if the EFTA Court were to go down the route of introducing direct effect of the Charter in the EEA, when giving specific expression to from a directive, adopting the third option, then this would be a dramatic and drastic change of how the EEA Agreement is interpreted and understood. This would probably not go down well with the EFTA states, but something they could learn to live with, ensuring the effects-based approach of EEA law which is indispensable to ensure the principle of homogeneity. Whilst initially a big move for EEA law, and would naturally be protested against in subsequent cases before the EFTA Court, in time, it would be accepted, just as it took time for the EFTA states to fully acknowledge the doctrine of state liability in the EEA legal order.

From an entirely legal point of view, the introduction of horizontal direct effect of the Charter in EEA law, when given specific expression to from a directive, would be the best solution, in line with the third option, as analysed above.[102] EEA law is based on its continuing evolution with EU law, which the principle of homogeneity demands. The least that individuals and economic operators deserve is legal certainty. Therefore, it is incumbent that the Charter is given effect to in EEA law in an akin manner to how it may in EU law, when provisions of the Charter are given specific expression to from a directive. This argument is based on clarity, homogeneity, legal certainty, and ensuring concurrent legal developments of EEA law. The introduction of the mere possibility of horizontal direct effect of the Charter, when given specific expression to from a directive, would initially introduce a provisional period where the full scope of the EEA Agreement would be muddied, given it would be revolutionary for the EEA legal order. Yet in the longer term, it would be the correct outcome, as it unites EU law and EEA law in effects-based harmony, and in line with the need to secure the principle of homogeneity.

The only other reasonable option which could offer a good solution for the EEA is more conventional, and that is to extend the application of state liability in the EEA, the second option, to also apply to some of the instances that today is covered direct effect in the EU. This would be to make sure that there is no legal vacuum. It would in turn make the doctrine of state liability, which is the narrow exception in EU law,[103] the main form of remedy in EEA law. What the EFTA Court called a possible solution in *HOB-vin* might also be the best way to move forward more generally. An extension of the EFTA Court's findings

[102] See Section 5.3 (Option 3 for EEA law – Horizontal direct effect of the Charter) of this article.

[103] Prechal, 'Member State Liability and Direct Effect: What's the Difference After All?' (n 64) 309.

in *Sveinbjörnsdóttir* and *HOB-vin*, or in other words, an extension of the scope and applicability of the doctrine of state liability, would be the solution most aligned with the established perspectives of EEA law. However, it is far from the optimal solution, which is, as already stated, and from a strictly legal perspective, the third option.

7 CONCLUSION

Rights under the Charter are increasingly becoming more ingrained in wider EU legal thinking, feeding its way into workings within EU Member States. Direct effect too is a right of its own – a form of 'procedural' right to invoke EU law in national settings.[104] It would be a shame if this newly developed corpus of law on horizontal direct effect in EU law were to be deliberately omitted from the EFTA states that apply the EEA Agreement. The only viable solutions involve action of the EFTA Court. The responsibility lays with it for the future development of the constitutional character of EEA law. The EFTA Court's approach to date has been subtle, and non-committal. In time, it will have to take a more affirmative position. Elsewhere, to paraphrase the words of the one former President of the EFTA Court when discussing the significance of *Sveinbjörnsdóttir*,[105] how the EFTA Court chooses to deal with this situation regarding horizontal direct effect could make or break EEA law. It has been argued that the EFTA Surveillance Authority (ESA) must take a more assertive role for compliance issues arising in EFTA states, given the current absence of direct effect.[106] Certainly this is true, so the question therefore is what kind of assertion the ESA will push for, be it pleading for the EFTA Court to rely on the Charter in its interpretative role,[107] or alternatively, to press for interpretation that does not do so, and relies on EEA law alone.

There have been corners of academic debate for some time whom have advocated for horizontal direct effect of directives in EU law.[108] This has not yet come to pass, but the Charter has now come onto the scene, and has seen the potential for the horizontal direct effect of that, when given specific expression to from a directive. Thus, it is worth recalling the Opinion of the Advocate General in *Kücükdeveci*, whom neatly summed up the stakes before the Charter entered into binding legal force. He stated that:

> '[G]iven the ever increasing intervention of [EU] law in relations between private persons, the Court will, in my view, be inevitably confronted with other situations which raise the question of the right to rely, in proceedings between private persons, on directives which contribute to ensuring observance of fundamental rights...[This is because in the C]harter are a number which are already part of the existing body of [EU] law in the form of directives. In that perspective, the Court must, in my

[104] Sacha Prechal, *Directives in European Community Law: A Study of Directives and Their Enforcement in National Courts* (Clarendon Press 1995) 125.

[105] Baudenbacher (n 96) 129-137.

[106] Niels Fenger, Michael Sánchez Rydelski and Titus Van Stiphout, *European Free Trade Association (EFTA) and European Economic Area (EEA)* (Kluwer Law International 2012) 136.

[107] The Report for the Hearing in Joined Cases E-11/19 and E-12/19 *Adpublisher AG v J & K*, pending, a number of parties invoke the Charter in their submissions, including Austria, Ireland, the ESA, and the Commission.

[108] For example with respect to directive in themselves, which has still not come about, see, Takis Tridimas, 'Horizontal Effect of Directives: A Missed Opportunity' (1994) 19 European Law Review 621.

> view, think now about whether the designation of rights guaranteed by directives as fundamental rights does or does not strengthen the right to rely on them in proceedings between private parties'[109]

By analogy, EEA law is facing a similar conundrum that is going to have to be answered at a near juncture. The doctrine of state liability in EEA law, beginning with *Sveinbjörnsdóttir*, cannot alone continue to be central to the functioning and application of EEA law and its system of limited remedies.

How the EFTA Court chooses to deal with horizontal direct effect and the place of the Charter in EEA law may be decisive for the future of EEA law as we know it. Horizontal direct effect would, it is submitted by a former Advocate General, 'offer an appropriate way of making the judicial protection which individuals deserve complete, coherent[,] and equal for all'.[110] He also stated that such a doctrine should exist in EEA law on the basis of Article 6 of the EEA Agreement.[111] This was a view on directives that the CJEU has not yet taken, but given the place of the Charter in the current era, anything in possible in the future.

As another former President of the EFTA Court and later a judge of the CJEU has stated, 'ensuring the survival of the EEA, as we know it today,…[means that] the principle[] of direct effect' must apply, even if that means direct effect in a different form that than in EU law.[112] This latter approach is correct, and demonstrates an open, problem-solving attitude to arising issues in EEA law, which, regrettably, is a minority in scholarship on EEA law. Taking this open-minded approach means that relevant actors and interests in the EEA can begin to have serious discussion about the future of EEA law in light of the arising developments in EU law. Horizontal direct effect in both EU law and EEA law has much runway ahead of itself.

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[109] Opinion of Advocate General Bot, Case C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG.*, ECLI:EU:C:2009:429, para 90.

[110] Walter Van Gerven, 'The Horizontal Effect of Directive Provisions Revisited: The Reality of Catchwords' in Deirdre Curtin and Tom Heukels (eds), *Institutional Dynamics of European Integration: Essays in Honour of Henry G. Schermers, Volume II* (Martinus Nijhoff Publishers 1994) 348.

[111] See, Walter Van Gerven, 'The Genesis of EEA Law and the Principles of Primacy and Direct Effect' (1992) 16 Fordham International Law Journal 955.

[112] Sevón (n 71) 732.

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THE UNFAIR CONTRACT TERMS DIRECTIVE: MEANING AND FURTHER DEVELOPMENT

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The harmonisation of consumer law in Europe has been an important objective within the EU. Efforts have focused not only on improving the functioning of the internal market, but also on securing a high level of consumer protection in the Member States. With regard to consumer contracts, the Unfair Contract Terms Directive has come to play a key role, not least due to the case law of the European Court of Justice in this area in recent years. This article examines the need for an unfairness test of standard contracts and argues that the directive can be expanded to also include individually negotiated contract terms, and terms that relate to the main subject matter of the contract, the adequacy of the price, and changed circumstances. Such amendments would result in a greater correspondence between EU law and Swedish and Nordic law. Although full harmonisation is not possible in the short term, I will argue that a revision should point in this direction. However, I will begin my account with a presentation of the directive and how it has been implemented in Swedish law.

1 INTRODUCTION

The Directive on Unfair Terms in Consumer Contracts was adopted in 1993 and has formed an important part of consumer protection in the EU.[1] The preamble to the directive states that the directive aims to facilitate the establishment of an internal market and to protect consumers acquiring goods or services through contracts.[2] It emphasises that a seller or supplier should protect consumers against the abuse of power, in particular with regard to one-sided standard contracts and the unfair exclusion of essential rights in contracts.[3] The preamble however also points out that the directive is designed as a minimum directive only.[4] In the directive, a distinction can be made between the transparency requirements set out in Article 5, the unfairness test set out in Articles 3 and 4, the non-binding effect of unfair contract terms under Article 6 and injunctions in the common interest of consumers under Article 7. The presentation below aims to present an overview of these provisions in the directive.

The idea of appropriate and effective remedies is a basic idea in the Unfair Contract Terms Directive. In order to compensate for the fact that consumers often do not know

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[1] See Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts [1993] OJ L 95/29. Regarding the importance of consumer law in the EU, see the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, Articles 114, 169; the Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, Article 38.

[2] Recital 6.

[3] Recital 9. The term 'seller or supplier' is defined in Article 2 as 'any natural or legal person who, in contracts covered by this directive, is acting for purposes relating to his trade, business or profession, whether publicly or privately owned'. In the following, I will use the word 'seller' when referring to this definition of 'seller or supplier'.

[4] Recital 12; Article 8.

their rights, the European Court of Justice has prescribed that the national courts are obliged to examine ex officio whether a contract term is unfair. If a national court concludes that a term is unfair, the term shall not apply unless the consumer insists that it should. The requirement of ex officio review is subject to a certain duty to investigate, which means that the national courts are obliged to take the initiative to gathering the evidence needed to determine whether a contract term is unfair under the directive.[5] In the present article, I will however ignore the procedural aspects, although they are important and well worth examining.

2 THE TRANSPARENCY REQUIREMENTS

2.1 REQUIREMENTS OF THE DIRECTIVE

The transparency requirements are expressed in Article 5, which states that terms offered to the consumer in writing must always be drafted in plain, intelligible language, and that the interpretation most favourable to the consumer shall prevail in cases where there is doubt as to the meaning of a contract term.[6] The preamble emphasises that the transparency requirements entail that the seller is under obligation to ensure that the consumer is given opportunity to review the terms.[7] If the transparency requirements are not met, a contract term may according to Article 4, be subjected to an assessment of unfairness, even if it concerns the main subject matter or the adequacy of the price of a good or service. The requirements apply solely to non-individually negotiated contract terms.[8] Furthermore, the indicative list of unfair terms includes terms the purpose or effect of which are to irrevocably bind the consumer to terms, which he has no real opportunity of becoming acquainted with before the conclusion of the contract.[9]

The European Court of Justice has ruled that the requirements of transparency cannot be reduced to simply a matter of formal and grammatical comprehensibility. The contract terms must also provide clear, intelligible criteria that enable the consumer to evaluate the economic consequences of the terms prior to the conclusion of the agreement.[10] The court further states that 'the consumer' in the requirements of transparency should be understood as an average consumer, ie a reasonably well informed, observant and circumspect consumer.[11] The consumer is however assumed to be at a disadvantage, which means that

[5] See Commission Notice, Guidance on the interpretation and application of Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms [2019] OJ C 323/04, 44–61.
[6] See Commission Notice (n 5) 25–29. Compare, for example, Hans-W Micklitz and Norbert Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 Common Market Law Review 771, 786–788; Marco BM Loos, 'Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law' (2015) 52 European Review of Private Law 179; Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (Taylor & Francis 2017) 129, 152–153; Nils Jansen, 'Unfair Contract Terms' in Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018) 943–944.
[7] Recital 20.
[8] Commission Notice (n 5) 25.
[9] Annex point 1 (i).
[10] Case C–186/16 *Ruxandra Paula Andriciuc and Others v Banca Romaneasca SA* EU:C:2017:703, paras 44–45. See also Commission Notice (n 5) 26–27.
[11] See, for example, *Andriciuc* (n 10) para 47; Case C–26/13 *Árbat Kásler and Rábai Hajnalka Káslerné v OTP Jelzálogbank ZRT* EU:C:2014:282, para 39. Compare Loos (n 6) 188; Howells et al (n 6) 151–152.

the requirements of transparency should be interpreted broadly and that consideration should be given to whether the consumer has been sufficiently informed of the relevant circumstances to be able to understand the meaning and consequences of the terms. The guidance on how to interpret and apply the directive issued by the Commission mentions a number of factors that may affect the assessment. These include, for example, whether important stipulations have been given a prominent place and whether the terms are placed in a contract or context where they may reasonably be expected.[12]

Regulations on a seller's duty to provide information or disclosure to consumers can also be found in other parts of the EU legislation, such as the directives on consumer rights, unfair commercial practices, consumer credit and package travel.[13] Compliance with sector-specific acts of this kind is an important factor when examining whether the requirements of transparency under the Unfair Contract Terms Directive are met.[14] However, the fact that a sector-specific act lacks information requirements in a particular respect does not prevent the establishment of such requirements under the Unfair Contract Terms Directive, which allows the directive to play a complementary role in relation to the other acts.[15]

2.2 IMPLEMENTATION OF THE REQUIREMENTS IN SWEDISH LAW

In Swedish law, Article 5 of the Unfair Contract Terms Directive has been implemented through the introduction of Section 10 in the Consumer Contracts Act. This rule stipulates that if there is doubt as to the meaning of a contract term, the term shall be interpreted in favour of the consumer. The rule has been criticized for not making sufficiently clear that it is the interpretation most favourable to the consumer that should apply.[16] It has also been argued that the scope of the rule has been interpreted in an overly restrained manner in case law.[17]

Furthermore, the first sentence of Article 5, ie that a contract term must be drafted in plain, intelligible language, has not been implemented in the act. Swedish courts are, however, obliged to apply this part of the article even if it is not included in the act.[18] An argument could further be made for the introduction of a rule that draws the reader's attention to the strict requirements that the European Court of Justice has deemed follow from the transparency requirements – including that they constitute a complement to the information requirements in other directives. A requirement of clarification of unexpected and onerous

[12] Commission Notice (n 5) 25–26.
[13] See Directive 2005/29/EC of the European Parliament and of the Council of 11 may 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011on consumer rights [2011] OJ L 304/62; Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers [2008] OJ L 133/66; Directive (EU) 2015/2302 of The European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements [2015] OJ L 326/1.
[14] Case C–453/10 *Jana Pereničová Vladislav Perenič v SOS finance, spol. sr. o.* EU:C:2012:44, para 43. Compare Jansen (n 6) 944.
[15] Commission Notice (n 5) 209.
[16] See, for example, Ulf Bernitz, *Standardavtalsrätt* (9th edn, Nordstedts Juridik 2018) 110.
[17] ibid 110.
[18] ibid 109–110.

contract terms has admittedly developed in Swedish case law.[19] But this requirement already applied when the directive was implemented.

3 THE UNFAIRNESS TEST

3.1 REQUIREMENTS OF THE DIRECTIVE

Article 3 of the Unfair Contract Terms Directive sets out the basic criteria for assessing whether a contract term is unfair (the unfairness test). The article stipulates that a contract term, which has not been the subject of individual negotiation, shall be considered unfair if it, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. The article further states that a contract term has been the subject of individual negotiation if it has been drafted in advance, and the consumer has therefore not been able to influence the content of the term – something that especially applies to pre-formulated standard contracts. Furthermore, it is important to remember that the unfairness test, according to Article 4, does not cover the adequacy of the price and the main subject matter of the contract, if the transparency requirements are fulfilled.

With regard to the question of whether a contract term causes a significant imbalance to the detriment of the consumer, the European Court of Justice has ruled that national courts must take into account what non-mandatory contract law rules apply under domestic law if the term has not been incorporated.[20] A deviation from the rules does not have to render significant financial consequences for the consumer in order to be relevant. It is enough that the default rules are undermined in a sufficiently serious manner.[21] This provides the national courts with a broader assessment framework and enables them to consider contract terms unfair more often than would be the case if the decisions were based solely on a quantitative economic assessment. If there are no default rules, the question of whether or not there is an imbalance must be assessed in the light of other points of reference, such as what constitutes fair and equitable market practices.[22] The national courts can also take into account the *acquis communautaire* and the transparency requirements. [23]

Article 3 further refers to an annex containing an indicative, non-exhaustive list of terms, which may be considered unfair.[24] The list includes terms containing personal injury disclaimers, undue restrictions on the consumer's rights in the event of breach of contract, unilateral confiscation of advances, disproportionately large compensation amounts in the event of non-payment, seller's unilateral right to alter the characteristics of a product or service without valid reason, seller's unilateral right to determine whether the delivered

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[19] ibid 70.
[20] See Case C–237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG. v Ludger Hofstetter and Ulrika Hofstetter* EU:C:2004:209; Case C–415/11 *Mohamed Aziz v. Caixa d'Estalvis de Catalunya* EU:C:2013:164, para 68; Case C–226/12 *Constructura Principado SA v José Ignacio Menéndez Álvarez* EU:C:2014:10, para 21; Case C–421/14 *Banco Primus SA v Jesús Gutiérrez Garcia* EU:C:2017:60, para 59; *Andriciuc* (n 10), para 59. See also Commission Notice (n 5) 31–32. Compare Micklitz and Reich (n 6) 771, 776–778; Howells et al (n 6) 141, 147; Jansen (n 6) 941–942.
[21] See *Constructora Principado* (n 20) paras 22 and 23. See also Commission Notice (n 5) 31; Jansen (n 6) 939.
[22] Commission Notice (n 5) 30.
[23] Loos (n 6) 189; Jansen (n 6) 943.
[24] Commission Notice (n 5) 35–36.

product or service complies with the contract and restrictions on the consumer's right to go to court. Although the list is only indicative, the European Court of Justice has emphasised that the list is an essential part of the assessment of whether a term is unfair.[25]

With regard to the question of whether the imbalance is contrary to good faith, the preamble to the directive emphasises that the bargaining power of the parties and whether the consumer was encouraged to accept the terms, must be taken into account.[26] The seller can fulfil the requirement of good faith by acting fairly and equitably towards the consumer and by considering the consumer's legitimate interests. According to the European Court of Justice, the national court must examine whether the seller, dealing fairly and equitably with the consumer, could reasonably have assumed that the consumer would have agreed to such a term in an individual negotiation.[27] In such an assessment, the kind of hypothetical test sometimes referred to as a *possible agreement test*, thus becomes crucial.[28] What is to be understood by 'dealing fairly and equitably' can, however, be specified in different ways.

Article 4 states that the unfairness of a term shall be assessed, taking into account the nature of goods and services for which the contract was concluded, all circumstances attending the conclusion of the contract as well as all other terms of the contract or of another agreement on which the term depends.[29] This means that each assessment must be made individually. A burdensome contract term does not have to be unfair if, for example, the disadvantaged person is compensated in other respects or if a fair and equitable seller could reasonably assume that, the consumer would have accepted the term in an individual negotiation.

How the unfairness test works can be illustrated with the help of the following example. Assume that a seller has disclaimed his liability under the provisions of the law. In such a case, point 1 (b) in the indicative list of unfair contract terms, stating that a contract term provided by the seller is unfair if it unduly restricts the consumer's legal rights, is applicable. The fact that the seller has limited the consumer's rights through the disclaimer is an indication of the unfairness of the term in question. However, the seller can neutralise this initial assessment by presenting facts, which show that he, as a fair and equitable person, could reasonably assume that the consumer would accept the term in an individual negotiation.

3.2 IMPLEMENTATION OF THE REQUIREMENTS IN SWEDISH LAW

In Swedish law, the courts have had significant opportunities to adjust or override an unfair contract term by applying Section 36 of the Contracts Act since 1976. Unlike in the directive, no exemption is made for contract terms that have been negotiated individually or that relate to the main subject matter of the contract or the adequacy of the price. During implementation, it was established that Swedish contract law essentially meets the requirements set by the directive. Some adjustments were however made, for example in Section 11 of the Consumer Contracts Act, which states that circumstances that occur after

[25] Case C–472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlesi Zrt* EU:C:212:242, para 26. Compare Micklitz and Reich (n 6) 789; Howells et al (n 6) 138, 145–146; Jansen (n 6) 945–946.
[26] Recital 16.
[27] *Aziz* (n 20), para 69. See also Commission Notice (n 5) 29–30; Howells et al (n 6) 148–149.
[28] Micklitz and Reich (n 6) 790–791; Howells et al (n 6) 148; Jansen (n 6) 944–945.
[29] Commission Notice (n 5) 33–34; Compare Jansen (n 6) 940.

a contract has been entered into may not be taken into account if this is to the detriment of the consumer in that a contract term that would otherwise be deemed unfair cannot be overridden or adjusted.

Even if Swedish law essentially meets the requirements set by the directive, it is only in recent years that any major attention has been paid to the directive. The interpretation of the requirement of good faith made by the European Court of Justice (the possible agreement test) is a novelty in Swedish law, but the courts should be able to apply the requirement without difficulty within the framework of the current legislation.

4 THE NON-BINDING NATURE OF UNFAIR CONTRACT TERMS AND PROHIBITIONS IN THE COMMON INTEREST OF CONSUMERS

4.1 REQUIREMENTS OF THE DIRECTIVE

Article 6 states that Member States shall ensure that unfair contract terms are not binding on the consumer. In other respects, however, the Contract shall remain binding on the parties if it can survive without the unfair terms. The European Court of Justice has emphasised that unfair terms can have no effect on consumers. The court points out that any effort to make the terms partially binding would eliminate the deterrent effect that the rule seeks to establish.[30] If a contract term is disregarded, the resultant gap can however if necessary be filled with a supplementary rule, if the contract can survive in other respects.[31]

Article 7 of the directive further states that Member States should ensure the existence of effective means to prevent the continued use of unfair terms. This includes ensuring that persons and organisations with a legitimate interest in protecting consumers can initiate proceedings under national law wherein courts and administrative authorities can determine whether contract terms designed for general use are unfair and respond appropriately to prevent future use of such terms.[32] The article complements the purely contractual provisions and means that for example government authorities may prohibit the use of an unfair term.

4.2 IMPLEMENTATION OF THE REQUIREMENTS IN SWEDISH LAW

The implementation of Article 6 in Swedish law has been inadequate. The requirements cannot be found in either Section 11 of the Consumer Contracts Act or Section 36 of the Contracts Act. The fact that the European Court of Justice has ruled that a contract term that falls within the scope of the directive is not to be adjusted but declared non-binding, needs to be clearly expressed in Swedish legislation.[33] The current wording allows much room for misinterpretation of how the rules apply.

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[30] Case C–421/14 *Banco Primus SA v Jesús Gutiérrez Garcia* EU: C:2017:60; Joined Cases C–154/15, C–307/15 and C–308/15 *Fransisco Gutiérrez Naranjo v Cajasur Banco SAU* EU:C:2016:980, para 61. See also Commission Notice (n 5) 39–41; Howells et al (n 6) 154.

[31] *Kásler* (n 11) paras 80 and 81. See also Commission Notice (n 5) 41–43.

[32] Commission Notice (n 5) 63–64. Compare Micklitz and Reich (n 6) 794; Reinhard Steennot, 'Public and Private Enforcement in the Field of Unfair Contract Terms' (2015) 23 European Review of Private Law 589; Howells et al (n 6) 155.

[33] Compare Bernitz (n 16) 180–182.

Article 7 has been implemented in Swedish law through Section 3 of the Consumer Contracts Act, which states that a special court (Patent- och marknadsdomstolen) can prohibit a seller from future use of a term that is unfair to the consumer, if prohibition can be justified from a general point of view. A state authority (Konsumentombudsmannen, KO) exercises the supervision in this area and has the right to bring an action before the court. The court's grounds for assessment are well in line with the directive's provision that a term may not, in breach of the requirement of good faith, give rise to a significant imbalance in the parties' rights and obligations that is to the detriment of the consumer. An important task for KO has been to reach agreements with sellers' organisations on standard terms in various areas. Such agreements can clean up the market and result in KO not having to bring actions before the court.[34]

5 WHY REGULATE STANDARD CONTRACTS?

The preamble to the Unfair Contract Terms Directive states that the directive has been adopted to promote the creation of more uniform rules across Europe and to prevent sellers from abusing their power vis-à-vis consumers by incorporating one-sided standard contracts.[35] The question is, however, why the use of standard contracts can disadvantage consumers.

Characteristic of the use of standard contracts is that such use makes it hard for consumers to influence the design of terms in individual negotiations, thus limiting their choice to either adopting or rejecting the terms in their entirety.[36] In deciding whether this is to the detriment of consumers, we have reason to examine how the market for standard contracts works.[37] Assume that the question is whether sellers should introduce a warranty or not. If the consumers are willing to pay more for the warranty than it costs the sellers to introduce it, the standard contract will include the warranty; if the consumers are not willing to pay more, the companies will refrain from introducing the warranty. Admittedly, there are no individual negotiations about the terms and each consumer is offered either to buy the product under the current terms or to waive the contract. Nevertheless, it can be argued that the important thing for consumers is not whether the terms can be individually negotiated, but that the market has the ability to offer the terms that consumers want.

The analysis above is based on the assumption that all consumers value a standard contract equally. This need of course not be the case, which means that some consumers will be disadvantaged by the market's supply of standard contracts. In order for it to be profitable for sellers to offer alternative standard contracts, however, consumers must be willing to pay the additional costs that these give rise to. The same applies here as in relation to the seller's opportunities to maintain a wide range of products: economies of scale mean that companies only offer a limited number of products. Admittedly, the legislator could prescribe that sellers

[34] See Bernitz (n 16) 209–221.
[35] Recital 6, 9.
[36] Compare Friedrich Kessler, 'Contracts of Adhesion' (1943) 43 Columbia Law Review 629, 640. See also Andrew Robertson, 'The Limits of Voluntariness in Contract' (2005) 29 Melbourne University Law Review 1.
[37] Alan Schwartz and Louis L Wilde, 'Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests' (1983) 69 Virginia Law Review 1387; Russel Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 University of Chicago Law Review 1203.

must offer alternative standard contracts. However, such legislation is not to the advantage of consumers who prefer being able to buy the product at the lower price that uniform standard contracts give rise to.

In order to be able to assess whether a standard contract is to the detriment of the consumer, consideration must also be given to whether consumers have had the opportunity of forming an opinion about what the terms offered actually mean.[38] Obtaining, comparing and deciding on contractual terms takes time and effort and a consumer must therefore assess whether the extra costs that this entails are covered by the profit gained by such an activity, which means that the consumer often chooses to consider price and quality only.[39] Assume that a contract term limits the seller's liability – a provision that entails a cost saving of SEK 100 per item for the seller – and that the consumers, had they, as informed persons paid attention to this provision, would have been prepared to pay SEK 150 for the seller to waive the limitation of liability. In this situation, both parties would have been better off if the limitation of liability had been removed and the price was increased by, for example, SEK 125: the value of such a regulation would have increased by SEK 25 for both the seller and the buyer. The fact that the limitation of liability still exists is because consumers only take the price of the product into account. This means that a company that waives the term and instead raises the price will lose its customers.

This mechanism poses a problem not only for uninformed consumers, but also for consumers who are informed and wish to negotiate better terms.[40] The practical difficulties involved in negotiating terms are often so great that it is not profitable for the customer to initiate negotiations.[41] If the terms are not perceived to be so poor that they discourage the customer from entering into the contract altogether, the customer will have no incentive to educate himself further on the contents of the terms before entering into the contract. This mechanism will result in consumers refraining from forming an opinion of the terms, even if a majority of them – as informed persons – would have preferred other terms. This creates a vicious circle and reduces the likelihood of there ever being a large enough group of informed buyers willing to bear the costs required to achieve market discipline.

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[38] Compare, for example, George A Akerlof, 'The Market for "Lemons" and the Market Mechanism' (1970) 84 Quarterly Journal of Economics 488; Korobkin (n 37) 1216–1218; Hans-Bernd Schäfer and Claus Ott, *The Economic Analysis of Civil Law* (Edward Elgar 2004) 370–373; Jansen (n 6) 966.

[39] See, for example, Omri Ben-Shahar, 'The Myth of the "Opportunity to Read" in Contract Law' (2009) 5 European Review of Contract Law 1; Michael G Faure and Hanneke A Luth, 'Behavioral Economics in Unfair Contract Terms' (2011) 34 Journal of Consumer Policy 337.

[40] Compare, for example, Avery Katz, 'The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation' (1990–1991) 89 Michigan Law Review 215, 282–288.

[41] The seller may find it difficult to distinguish between good consumers, who fulfil their obligations, and bad consumers, who do not. A consumer who requests more far-reaching protection than the standard contract offers may therefore arouse suspicion in the seller (who might think the consumer belongs in the latter category). As a consequence, the seller might not agree to deviate from the standard contract unless he is compensated for the additional risk that an agreement with the consumer might involve. Although the consumer may break this resistance if he can convince the seller that he is a good consumer, this complicates the contract and is not always possible. This can result in the consumer refraining from raising the issue and instead accepting the bad terms, if they are not perceived as so poor that they discourage the consumer from concluding the contract altogether. Compare Omri Ben-Shahar and John AE Pottow, 'On the Stickiness of Default Rules' (2005–2006) 33 Florida State University Law Review 651; Lucian A Bebchuk and Richard A Posner, 'One-Sided Contracts in Competitive Consumer Markets' in Omri Ben Shahar (ed), *Boilerplate*: The Foundation of Market Contracts (Cambridge University Press 2007) 3, 11.

Admittedly, sellers risk losing their trustworthiness if consumers subsequently notice that they are shifting the distribution of risk to their own advantage, but in the case of terms that regulate rare events that involve limited amounts of money, the number of dissatisfied customers will likely remain small. Furthermore, the dissatisfied customers may well be inclined to continue entering into contracts on sellers' terms if they do not expect to find better terms in other standard contracts on the market.

It can be argued that it is in a seller's interest to voluntarily inform consumers of the fact that the company is offering better terms than its competitors do. If consumers, as informed persons, are prepared to pay a price that covers the company's costs for improving the terms of the contract, the company should of course inform consumers of the content of the terms. The problem with this is, however, that if the consumers are convinced that it is in their interest to pay a higher price for improved contract terms, this will benefit all sellers, which means that the seller in question must bear the full cost while only benefitting from part of the profit.[42] The seller can of course highlight certain terms, but will by doing so run the risk of misleading consumers, since there might be other parts of the contract that are less favourable to the consumer and that the seller thus wishes not to draw attention to.

6 THE UNFAIR CONTRACT TERMS DIRECTIVE AS A MEANS OF NUANCED INTERVENTION

The fact that consumer markets for standard contracts have shortcomings justifies the legislator intervening to rectify the irregularities. The Unfair Contract Terms Directive is part of such an intervention at EU level. Characteristic of the directive is that it is based on what can be called nuanced intervention. The background to this claim is that the directive, unlike mandatory rules, emphasises the importance of the seller meeting certain transparency requirements and that the question of whether a contract term should be non-binding for the consumer is answered by means of an unfairness test.

With regard to the transparency requirements, these aim to persuade sellers to inform consumers about the meaning and consequences of the contractual terms, especially unexpected and burdensome terms. If the consumer is made aware of the unfavourable terms, the probability of him refraining from entering into the agreement will increase. If a sufficiently large number of consumers decide to forgo the offer, the seller may voluntarily choose to remove the terms in the hope that he will thereby be able to sell more goods or services.[43] Even if each individual consumer has little chance of influencing the content of the terms, a group of consumers may stand a better chance of changing the terms and disciplining the market. To what extent is an empirical question that is difficult to answer. However, the transparency requirements are aimed at making it easier for consumers to enter into contracts in an informed manner. The importance placed on consumers being able to

[42] Compare, for example, Oren Bar-Gill, 'The Behavioral Economics of Consumer Contracts' (2007–2008) 92 Minnesota Law Review 749, 758–761.

[43] See Francis Herbert Buckley, 'Three Theories of Substantive Fairness' (1990–1991) 19 Hofstra Law Review 33, 63. However, this presupposes that the seller cannot discriminate by offering informed and uninformed consumers different standard contracts. See Korobkin (n 37) 1237. Compare, for example, Oren Gazal-Ayal, 'Economic Analysis of Standard Form Contracts: The Monopoly Case' (2007) 24 European Journal of Law and Economics 119.

make an informed choice is a prominent feature also in other consumer directives, such as the Unfair Commercial Practice Directive and the Consumer Rights Directive.[44]

The unfairness test is characterised by the fact that it takes into account not only the individual term, but also the content of the contract in its entirety and the circumstances at the time of the conclusion of the contract, which makes a nuanced assessment possible. Insofar as there are non-mandatory rules in the Member States, these will be the primary yardstick for assessing any significant imbalance in the rights and obligations of the parties. What constitutes fair and equitable market practices provides another yardstick and one, it can be argued, that should be based on what the parties, as informed persons would have contracted.[45] The unfairness test can be based on certain principles, such as that the party able to prevent a loss at the lowest cost or to insure itself against a certain risk at the lowest cost should be the party bearing the responsibility. This creates incentives for sellers to introduce terms that correspond to expectations in a functioning market for contract terms. The meaning of 'fairly and equitably' is admittedly not unequivocal. It can however be argued that the requirement is consistent with the view that it is of crucial importance whether or not the seller could reasonably have assumed that the consumer, as an informed person, would have accepted the term.[46] It could perhaps also be argued that a seller, dealing fairly and equitably, should dissuade consumers from entering into overly risky and hazardous contracts, such as those sometimes found in the markets for certain types of credit agreements and dangerous goods. From a consumer protection point of view, a modification in this direction may be warranted.

One problem with using an unfairness test based on individual circumstances is that it can be hard to foresee the outcome and that a national court do not always have sufficient knowledge of how the market works to be able to assess what constitutes fair and equitable market practices. It could however be argued that this problem would be solved if the assessment were to be standardised to some extent. The indicative list of unfair contract terms may form the basis of such a standardised assessment. Although the list is only indicative, the European Court of Justice has ruled that it is an essential part of the assessment. It would therefore not be a giant leap to making it a regular presumption that the terms enumerated in the list are unfair by amending the directive. That would consequently mean that a seller introducing a term included in the list would have to be able

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[44] With regard to regulations on the duty to provide information, behavioral science offers important insights into how the information should be formatted in order to help recipients make an informed decision. See Rosella Incardona and Cristina Poncibó, 'The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution' (2007) 30 Journal of Consumer Policy 21, 34. Compare Garaint Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 Journal of Law and Society 349; Thomas Wilhelmsson and Christian Twigg-Flesner, 'Pre-Contractual Information Duties in the Acquis Communautaire' (2006) 2 European Review of Contract Law 441; Ben-Shahar (n 39); Sophie Bienenstock, 'Consumer Education: Why the Market Doesn't Work' (2016) 42 European Journal of Law and Economics 237, 255.

[45] Compare, for example, Hans Schulte-Nölke, 'No Market for "Lemons": On the Reasons for a Judicial Unfairness test for B2B Contracts' (2016) 23 European Review of Private Law 195, 213; Hein Kötz, 'Unfair Exemption Clauses' (1987) Svensk Juristtidning 473.

[46] The relationship between the requirement of significant imbalance and the requirement of good faith is unclear. However, the Commission writes that 'This confirms that, for the purpose of Article 3 (1), the concept of good faith is an objective concept linked to the question of whether, in light of its content, the contract term in question is compatible with fair and equitable market practices that take the consumer's legitimate interests sufficiently into account. It is thereby, closely linked to the (im)balance in the rights and obligations of the parties.' Commission Notice (n 5) 30.

to fully prove that the unfairness test was not met with regard to the circumstances in the present case.

No list of contract terms always deemed unfair has been attached to the directive. There are however, other EU directives on consumer contracts that provide consumers with rights that they may not waive. The rules in these directives are different to an indicative list or a list of regular presumption in that they do not provide the seller with an opportunity to prove that the deviation in question does not meet the criteria of the unfairness test. There are admittedly cases in which it would be better to use a mandatory rule than an unfairness test that takes the circumstances of the individual case into account. It can however be argued that the choice between mandatory rules and an unfairness test should be based on uniform principles and not be made randomly. This implies that the Unfair Contract Terms Directive should be coordinated with other consumer contract directives in such a way that for each directive, an assessment is made of whether it is sufficient that the terms that deviate from the rules are subjected to an unfairness test, or whether the rules should be mandatory.

The Unfair Contract Terms Directive stipulates that there should be effective means to prevent the continued use of unfair terms, for example through authorities banning the use of unfair contract terms in advance. Although such bans will naturally be based on what is typically considered unfair, they still offer sellers a more nuanced assessment of their terms than would be the case if mandatory rules were applied, since they take into consideration not only the individual term but also the content of the agreement as a whole. The method does not presuppose that an individual dispute has arisen, but enables organisations and authorities to attack unfair terms at an early stage. In its practical application, it can also lead to authorities or organisations negotiating better contract terms with the sellers. Such agreements provide a way of disciplining the market and result in contracts more in line with what the parties, as informed persons, would generally have contracted in a functioning market for standard contracts.[47]

7 FURTHER DEVELOPMENTS OF THE DIRECTIVE

7.1 THE IMPORTANCE OF INDIVIDUAL NEGOTIATIONS

It has been discussed whether the Unfair Contract Terms Directive should only apply to terms which have not been the subject of any individual negotiation between the parties.[48] Such a restriction exists in the directive, but is absent in Swedish law. The fact that the directive only covers non-individually negotiated terms may seem natural if the purpose is to check unilaterally established standard contracts.[49] It is however difficult to draw a sharp line between individually negotiated terms and terms that have not been individually negotiated, and a consumer may need protection in both cases.

The market does not always function in an acceptable way in individual negotiations. Experienced sellers often know how to go about getting their customers to accept an offer.

[47] It is important that authorities, consumer organizations and companies in various ways make it easier for consumers to distinguish between 'good' and 'bad' contract terms. There have for example been suggestions of non-legal approaches that make the contract terms more transparent by building on market devices such as ratings and labeling. See Ben-Shahar (n 39) 21–24.

[48] See, for example, Howells et al (n 6) 165; Jansen (n 6) 967.

[49] See, for example, Hans Schulte-Nölke (n 45) 195, 213.

There are various methods of persuasion that involve sellers playing on consumers' over-optimism, errors of thought, preconceived notions, time constraints, stress, fear, willingness to be right and so on, to bring about a contract.[50] An experienced seller can use factors like these to his advantage and thereby persuade consumers to enter into contracts, which they would otherwise never have considered. Cases where a seller systematically takes advantage of consumers' limited ability to make well-thought-out and informed choices, by for example instructing his salespersons to use different types of sales tricks in their contact with customers, are especially serious.

There is therefore a strong case for including individually negotiated terms in a future revised version of the Unfair Contract Terms Directive. Such an extension of the scope of the directive would safeguard consumers' ability to enter into contracts of their own free, rational, and informed will and would appear to be a natural complement to the Unfair Commercial Practice Directive. In assessing whether a term is unfair, national courts could then take into account the case law that has emerged on aggressive and misleading commercial practices in the European Court of Justice.

7.2 THE SIGNIFICANCE OF TERMS RELATING TO THE MAIN SUBJECT MATTER AND THE ADEQUACY OF THE PRICE

One limitation of the unfairness test is that it – unlike Swedish law – does not cover terms relating to the main subject matter of the contract and the adequacy of the price, if these terms meet the transparency requirements. However, terms relating to the adequacy of the price are only exempt from the test when they define the main subject matter of the contract.[51] This means that there are a number of price provisions, such as ancillary price terms and price adjustment clauses that are covered by the test. Furthermore, a court can consider price when assessing whether other contract terms are unfair. The European Court of Justice has also taken a restrictive approach to exemptions in case law.[52] Taking another step in this direction, by completely abolishing the exemptions for terms relating to the main subject matter and the adequacy of the price in a new directive, would therefore not seem to be inconsistent with the court's intentions.

It has been argued that judicial review of the unfairness of terms, which relate to the main subject matter of the contract or the adequacy of the price, is incompatible with a functioning market economy and presupposes assessment criteria that would be difficult to apply.[53] However, an unfairness test of such terms should not seek to determine which goods or services contracts should cover. Its only aim should be to ensure that no significant

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[50] Various techniques, based on the fact that there are certain common human characteristics that increase our tendency to agree, such as our will to reciprocate favours, behave consistently, act like others, accommodate people we like, and obey legitimate authorities, have been described. See Paul Benett Marrow, 'Crafting a Remedy for the Naughtiness of Procedural Unconscionability' (2003–2004) 34 Cumberland Law Review 11; Robert B Cialdini, *Influence: Science and Practice* (5th edn Pearson Education 2009).

[51] See, for example, Fernando Gómez Pomar, 'Core versus Non-Core Terms and Legal Controls over Consumer Contract Terms: (Bad) Lessons from Europe?' (2019) 15 European Review of Contract Law 177, 187.

[52] See, for example, Pomar (n 51) 188.

[53] See, for example, Schulte-Nölke (n 45) 201–203. Compare. Matteo Dellacasa, 'Judicial Review of "Core Terms" in consumer Contracts: Defining the Limits' (2015) 11 European Review of Contract Law 152, 158–162; Pomar (n 51) 185–187.

imbalance in the rights and obligations of the parties has arisen due to unfair business practices, and such testing would provide a much-needed complement to the transparency requirements in the directive and the Member States' rules on unfair exploitation and mistake.[54] The unfairness test could prove an important tool not least in the efforts to prevent sellers from taking advantage of consumers' inability to form adequate perceptions of price through different types of sophisticated and deceptive price schemes. Allowing for terms relating to the adequacy of the price to be subjected to an unfairness test need therefore, not result in general price control or the like and would harmonise with Swedish law.

Furthermore, if the price was subjected to an unfairness test, it can be argued that the seller should have the burden of proving that the price is not unfair if it significantly exceeds the market price. Invalidation of contracts containing unfair prices is not always the best solution, since it is often in the consumer's interest that the contract remains valid. It would therefore be preferable to offer the consumer the opportunity to choose between having the contract invalidated and allowing the current or an otherwise reasonable price to apply.[55]

7.3 THE SIGNIFICANCE OF CHANGED CIRCUMSTANCES

Unlike Swedish law, the directive does not take into account circumstances that occur after the conclusion of the contract, which means that changed circumstances are not considered in the unfairness test. This may seem strange considering that long-term consumer contracts in particular can be unfavourable to the consumer. Examples of long-term contracts of particular importance for consumers are contracts regarding credit, tenancy and basic services.[56] Introducing an article on the effects of changing circumstances should however not present any major problems.[57] Such an article could state that a court, if the fulfilling of a contract has become very burdensome for a consumer or the value of the consideration has decreased, may adjust the contract by either balancing it or declaring it terminated. It would however be reasonable to demand that the change in circumstances was unforeseeable to the consumer and that the consumer could not reasonably have anticipated the risk of the occurred.

7.4 TOWARDS FULL HARMONISATION

The Unfair Contract Terms Directive is a minimum directive. In order to increase harmonisation in the field of consumer law, the Commission in 2008 presented a proposal for a directive on full harmonisation of consumer rights, which included a section on unfair

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[54] Compare Dellacasa (n 53) 165. Atamer believes that ex post judicial control has its weaknesses and discusses tools which could counterbalance consumer biases on which the techniques rely, for example by unifying price information, facilitating comparison-shopping, informing consumers of their usage data and making switching easier. See Yesim A Atamer, 'Why Judicial Control of Price Terms in Consumer Contracts Might Not Always Be the Right Answer – Insights from Behavioral Law and Economics' (2017) 80 Modern Law Review 224. Regarding mistake and unfair exploitation, see, for example, Sebastian Lohsse, 'Validity' in Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018) 659–673, 701–706.

[55] Compare Dellacasa, (n 53) 174–176. See also *Kásler* (n 11) paras 76–85.

[56] Howells et al (n 6) 165.

[57] Regarding changed circumstances, see, for example, Thomas Rüfner, 'Change of Circumstances' in Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018) 899–92.

contract terms.[58] However, due to criticism from, among others, the Nordic countries, this section was never included in the directive.[59] Full harmonisation would admittedly facilitate trade in the internal market, and the EU has made efforts to achieve such harmonisation. It would however also prevent Member States from introducing more ambitious consumer legislation than the directive allows. Furthermore, the basic principles of subsidiarity and proportionality in EU law must be taken into account.

The question of whether a contract term is unfair has also been made dependent on whether it deviates from the default rules in the Member States. In order to be successful full harmonisation would therefore demand that a greater part of contract law in the Member States was harmonised.[60] It has however been emphasised that the European Court of Justice has gradually developed a more independent view of what characterises the assessment of unfairness. This is evident in for example the transparency requirements, the invocation of the *acquis communautaire*, the possible agreement test and the emphasis on the indicative list of unfair terms being an essential part of the unfairness test.[61] There is nothing to prevent further development in this direction and my proposal that the overall benchmark for the assessment of unfairness should be whether a contract term to significant extent deviates from what the parties could be assumed to have contracted, could form part of a more independent examination.

8 CONCLUSIONS

The Unfair Contract Terms Directive has, not least due to the case law of the European Court of Justice, come to play an important part in the control of standard contracts in consumer markets in Europe. This article explains why such control is needed and discusses the directive's role as a control instrument. In the article, I have shown how the transparency requirements and the unfairness test have given the directive the character of what may be called nuanced intervention. The fact that the European Court of Justice has ruled that the indicative list of unfair terms is essential to the assessment of unfairness, has however meant

[58] Proposal for a Directive for the European Parliament and of the Council on consumer rights, COM (2008) 614 final. In 2011, the Commission also presented a proposal for a Regulation on a Common European Sales Law (CESL), see Proposal for a Regulation of the European Parliament and the Council on a Common European Sales Law, COM (2011) 635 final. The proposal included rules on unfair contract terms. However, it only applied to cross-border trade and was designed as an 'optional instrument' in that it was only applicable in cases where the parties agreed that it should be. The proposal was never implemented.

[59] See Howells et al (n 6) 130.

[60] The question of whether there is a need for greater coordination of private law in Europe has been discussed within the EU. One of the manifestations of this discussion is the Draft Common Frame of Reference (DCFR), which was presented in 2009. In the 'full edition' of this document the rules are commented. See Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, vol. 1, full edition (Oxford University Press 2010). The DCFR is however not anchored in the political institutions of the EU and therefore so far only has the character of soft law. If nothing else, it can be viewed as a source of inspiration for future legislation and as a toolbox for the harmonisation of various concepts and rules. Mention should also be made of the work carried out by the so-called Lando Commission, which resulted in the Principles of European Contract Law (PECL). Regarding the efforts to harmonise European contract law, see also Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018).

[61] See Jansen (n 6) 943. Compare Oliver Gestenberg, 'Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts' (2015) 21 European Law Journal 599, 604.

that the need for a nuanced and fair assessment of each individual case must be weighed against the need for standardised assessment and predictability.

As has been pointed out, there are however, some cases in which a list of contract terms always deemed unfair would be needed. The article has further emphasised the need for coordinating the Unfair Contract Terms Directive with provisions in other consumer directives in such a way that the directives state whether an unfairness test is sufficient to determine if a deviation from the provisions should be allowed or whether the regulations should be made mandatory.

The article has also emphasised the need for an overall benchmark for the unfairness test and suggested that the assessment should be based on what the parties, as informed persons, could be assumed to have contracted in a functioning market for standard contracts. The standardised assessment could thus be based on what is normally the case, and the individualised assessment on what could be assumed to apply in the case at hand. Although the details of such a solution can be discussed further, and some modifications of the benchmark may be warranted, it is well in line with the interpretation of the requirement of good faith made by the European Court of Justice, and it is my hope that such a benchmark will be introduced in the future.

The scope of the current directive on unfair contract terms is restricted in that the directive does not take into account individually negotiated terms, terms regarding the main subject matter of the contract and the adequacy of the price or circumstances that occur after the conclusion of the contract. As has been pointed out in the article, the rationale for maintaining these restrictions can be called into question. A removal of the restrictions would mean that the assessment of unfairness would largely correspond to the assessment of unfairness in Swedish and Nordic law.

Whether the Unfair Contract Terms Directive should constitute a full harmonisation directive has been subject to much controversy. The answer to the question depends on how far the harmonisation of consumer contract rules will reach and to what extent contract law in general will be harmonised in the future. In the short term, however, it seems unlikely that an introduction of a full harmonisation directive would be successful, although the case law of the European Court of Justice and amendments to the directive may point in this direction.

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WHEN INTERNAL PRACTICES MOULD POWERS: THE PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION IN THE EUROPEAN PARLIAMENT

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This paper looks at the various forms of the functioning of the Presidency of Council of the European Union in the European Parliament. This interaction stems from EU legislation and practical inter-institutional arrangements. The overarching aim is to tackle the myriad of interaction in an analytical-descriptive way and shed light on the implications of these practices. The conclusion of this paper suggests that the internal rules of the European Parliament, most notably the rules of procedure, have had an impact on power relations at the expense of the Council although there is no EU primary law legal basis for Council accountability to the European Parliament. These mainly internally driven rules of the European Parliament have contributed to the practical environment for the functioning of the rotating Presidency in the European Parliament hence triggering spillover of tasks for the Presidency. The changes in the power relations may also have repercussions on the competence dimension in the longer term.

1 INTRODUCTION: COUNCIL PRESIDENCY ACTIVITIES IN THE EUROPEAN PARLIAMENT AND THEIR IMPLICATIONS

The Rotating Presidency of the Council of the European Union (Presidency)[1] represents the Council in the European Parliament (EP).[2] This paper aims at illustrating how the Presidency functions in the EP. Therefore, the main research question, which this paper aims to answer to, is: how does the Council Presidency function in the European Parliament during the six-month term of the Presidency? It strives for enlightening the legal basis of this important form of inter-institutional co-operation and sheds light on various practical aspects of this interaction. The main forms of Presidency functioning in the EP will be presented against this background. Furthermore, I attempt to approach the primary research question from the angle of power relations. With the concept of power relations, I am not directly referring to the legal notion of competence. This is because in the longer term the power relations

*LL.D. in constitutional law (University of Helsinki 2017). This paper does not in any way reflect or imply the views and positions of the employer of the author, the Ministry of Foreign Affairs of Finland.

[1] Pursuant to Article 1 (4) of the Council Rules of Procedure: " The Presidency of the Council, with the exception of the Foreign Affairs configuration, shall be held by pre-established groups of three Member States for a period of 18 months. The groups shall be made up on a basis of equal rotation among the Member States, taking into account their diversity and geographical balance within the Union.
Each member of the group shall in turn chair for a six-month period all configurations of the Council, with the exception of the Foreign Affairs configuration. The other members of the group shall assist the Chair in all its responsibilities on the basis of a common programme. The members of the team may decide alternative arrangements among themselves."

[2] In accordance with Article 26 of the Council Rules of Procedure "The Council shall be represented before the European Parliament or its Committees by the Presidency or, with the latter's agreement, by a member of the pre-established group of three Member States referred to in Article 1(4), by the following Presidency or by the Secretary-General. The Council may also be represented before European Parliament Committees by senior officials of the General Secretariat, acting on instructions from the Presidency".

tend to have an impact also on competence. In the end, conclusions will be drawn from this interaction in the context of inter-institutional setting of the policy and law-making of the European Union.

Given this big picture, one of the major objectives of this paper is to fill the gaps in relation to the Presidency functioning in the EP, which is not very well known. There are indeed bookshelves full of research on EP internal organization and work as well studies on policy and law-making co-operation between the institutions. Nevertheless, a comprehensive, academic outlook on Presidency duties towards the EP and the related practical implications has been lacking. In addition to the description of different forms Presidency interaction with the EP, also the efficiency and usefulness of such co-operation will be analyzed. In this context recommendations how to improve the co-operation will be set out.

The approach utilized is the analytical-descriptive method. The interdisciplinary analysis will hence be carried out by describing the normative framework and practical arrangements for the functioning of the Presidency in the EP. The analysis includes, however, also a theoretical layer, which sets the wider and systemic framework for the research question.

One way of explaining the development in inter-institutional relations has been neo-functionalism.[3] The key issue in neo-functionalism is to emphasize the European integration in terms of process rather than outcomes.[4] The fundamental issue in neo-functionalism has been the concept of spillover, which suggests that integration in one economic sector would create pressure for further economic and other forms of integration, and more capacity at the European level.[5] I will try to explore if the concept of spillover can be transferred to this particular area of inter-institutional relations, the Presidency interaction with the EP. The EP has greatly contributed in practical terms to the neo-functional doctrine of EU integration during the last few decades. The supranational institutions, the Commission and the EP have emerged in a longer run as winners when it comes to the competence. Looking at it proportionally, the Council, which represents inter-governmentalism, has been on the losing side.

The objective of this paper is not only to provide a practical insight into the Presidency functioning in the EP.[6] In particular, the EP has been able to extend its powers through various Treaty reforms over the time. Very often, the source of the changing of the Treaties has originated from the political struggles and practical arrangements for conducting EP business.[7] It has been commonplace that interpretation practice of the Court of Justice of the European Union (CJEU) has confirmed the competences of the EP, which signifies the role of the Court in empowering the EP.[8] The Parliament has often filled the political vacuum

[3] See Ernst B. Haas, *Uniting of Europe: political, social, and economic Forces 1950-1957* (UMI books 1996).
[4] Ben Rosamond, *Theories of European Integration* (MacMillan Press 2000), 55.
[5] ibid, 60.
[6] An in-depth examination of the relation between the Presidency and the Commission has been excluded from the scope of the analysis. For insight into these aspects see Ana Mar Fernández Pasarín 'The Reform of the Council Presidency: Paving the Way for a New Synergy with the European Commission?' Politique européenne 2011/3, n 3, 29-54.
[7] See for example Julian Priestley, *Six Battles that shaped Europe's Parliament* (John Harper Publishing 2008).
[8] See in particular case C-138/79, *SA Roquette Frères v Council* [1980], ECR 3333; case C-294/83, *Parti écologiste"Les Verts" v European Parliament* [1986], ECR 1339 and case C-70/88, *European Parliament v Council* [1990], ECR I-2041.

thus making it obvious that the political situation should be reflected in the division of competences.

In short, practices in inter-institutional issues do matter. The two supranational institutions, namely the Commission and the EP, which clearly have a special relationship in the forum provided by the EP to some extent leave the Council as a third wheel even more during the current legislative cycle. This is the case despite the fact that there is the highest political level, the European Council, which is also of intergovernmental nature having unanimity as the guiding principle in the decision-making.[9]

A key concept that I will be operating with throughout this paper is institutional balance.[10] According to Thomas Christiansen, the basic understanding of the notion is that not any single institution of the three key institutions (the Commission, the Council, the EP) should have fundamentally more weight and influence in the EU politics than the other two.[11] This balance between the institutions is extremely important for the functioning of the European Union as it draws the lines between the roles of the institutions in line with the competences and tasks of these major actors shaping EU legislation and policies.[12] Similarly, this concept is useful for discussing the interactions of the institutions during the Presidency and for the analysis of their adequacy and efficiency.

2 PRESIDENCY IN THE PARLIAMENT: A FIRM LEGAL BASIS OR SIMPLY ESTABLISHED PRACTICES?

It is stipulated in Article 232 of the Treaty on the Functioning of the European Union (TFEU) that the EP shall adopt its rules of procedure. The RoP can be considered as the Parliament's operational rules and they function as the regulatory framework for the internal organization of the EP. This includes *i.e.* describing the rights and obligations of Members of European Parliament (MEP) and identifying the organs of the Parliament.[13] Therefore, the RoP are the most important document for understanding the EP's internal, practice-oriented functioning. It must clearly be read in many respects together with the Treaties but it should be noted that the RoP are not EU primary law even though that is how EP may sometimes in political discussion presents the status of RoP in particular in relation to other institutions.

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[9] Pursuant to Article 15 (4) of TEU "Except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus". In fact, exceptions to this general rule are few.

[10] The Treaties do not directly refer to institutional balance, although it is enshrined in Article 13 (2) of TEU that "Each institution shall act within the limits of of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation". The concept of institutional balance developed in the EU law mainly as a part of interpretation practice of the CJEU especially in landmark ruling *Meroni,* see C-9/56, *Meroni & Co., Industrie Metallurgische, S.p.A v High Authority of the European Coal and Steel Community* [1958], ECR 133.

[11] Thomas Christiansen 'The European Union after the Lisbon Treaty: An Elusive 'Institutional Balance' In Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds) *EU Law after Lisbon* (Oxford University Press 2012), 228

[12] For a comprehensive analysis on institutional balance see Craig Paul '*Institutions, Power and Institutional Balance'* in Paul Craig and Grainné de Burca *The Evolution of EU Law* (Oxford University Press 2011).

[13] Parliamentary Rules of Procedure. An Overview. Office for Promotion of Parliamentary Democracy (European Parliament 2010), 6.

The Council RoP remain largely silent on the Presidency functioning in the EP.[14] They, however, set out on many occasions rules for the duties and tasks of the Presidency as well as on the representation of the Council in co-operation with other institutions.

It is clear that the division of competence among the EU institutions is enshrined in the Treaties.[15] Furthermore, secondary EU legislation may draw further demarcation lines when it comes to specific division of competences in relation to the different policy sectors. Very often, the specific roles of different institutions set out for example in Directives can further specify the practical responsibilities of the institutions and may hence have an impact on the competences, in particular in terms of the extent of competences.[16]

It is equally true that the practical arrangements of inter-institutional co-operation especially in the law-making process do not have an effect on the division of competence. One should, however, bear in mind that *modus operandi* may nevertheless be important for the practical conduct of legislative process and hence the outcomes of these procedures. The impact on the dynamics of the decision-making can be considerable. By assessing the framework consisting of legislation and practices it is possible to conclude that the EP has quite successfully utilized its internal norm-building exercises, most notably through the development of its RoP. These internal-driven rules have moulded the practices of inter-institutional co-operation in a way that has worked incrementally in the favour of the EP.

3 PLETHORA OF PRESIDENCY INTERACTION WITH THE EP

All collectivities need chairmanship and this holds true equally for the Council.[17] Chairing the Council includes many duties and tasks, such as being a manager, promoter of political initiatives, honest broker and spokesman for the Council.[18] These extracted roles of the Presidency often find their concrete expression in relation to the EP. The Presidency has various forms of interaction with the EP – all more or less essential for advancing the EU

[14] Rules of Procedure of the Council of the European Union. Council Decision of 1 December 2009 adopting the Council's Rules of Procedure. OJ L 325/35, 11.12.2009.

[15] Pursuant to Article 5 (1) of TEU "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality". The EU competence can be exclusive competence but also, and more often, shared competence with the Member States. The Union exclusive competences are defined in Article 3 and shared competence with Member States in Article 4 of TFEU. There is also a third but minor category of competence, namely supporting competence that is set out in Article 6 of TFEU. The extent and limits of the EU competence are always defined in the Treaties and consequently it is the CJEU that is the ultimate interpreter of the limits of the EU competence on a case-by-case basis in light of the Treaty. In the context of this paper, the issue of competence is not strictly understood as a division of competence between the Union and the Member States. The aim is also to shed light on intra-Union legislative competence within the Union sphere including the different EU institutions, in this case most notably the Council and the EP. Practical arrangements for conducting the Presidency and their repercussions are presented in this institutional connection.

[16] For the discussion on the legal basis of EU legislation and its institutional implications see in particular Annegret Engel *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (Springer Publishing 2018). See also Trevor C. Hartley *The Foundations of European Union Law: An Introduction to the constitutional and administrative Law of the European Union* (7th edn, Oxford University Press 2010), 118-121.

[17] Martin Westlake and David Galloway, *The Council of the European Union* (3rd edn, John Harper Publishing 2004), 325.

[18] ibid, 334.

law-making and policy agenda that is not always the easiest thing to do due to the inherent rivalry and tension between the institutions.[19]

If the functioning of the Presidency in the EP is so important does this mean that the Council and thus the Presidency is somehow accountable to the EP? There are different interpretations on this. Some scholars find that the Council is accountable[20] while others consider that this is not the case[21]. There is no black letter law or CJEU *praxis* based evidence on the potential accountability of the Council for the EP, except for the obligation, which applies to all institutions, namely sincere co-operation. Accountability is not the same thing as sincere co-operation.

It is stipulated in Article 14 (1) of TEU that "The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission". The political control referred to in this provision must be interpreted to consist of political control of the executive, the Commission, and not the Council. Furthermore, there are very few statutory primary law provisions that could be interlinked with this kind of control.[22] The practices of the interaction have been largely elaborated at much lower level, in the rules of procedure of the institutions. In the same vein, it should be mentioned that initiatives aiming at further empowerment of the EP, also vis-à-vis the Council, the right of initiative and the right of inquiry have not progressed by now.[23]

It is of particular importance that with regard to the Parliament the Presidency sticks to the principle "underpromise, overdeliver".[24] It is clear that the Parliament aims at getting Council representatives to promise, *i.e.* in Committee hearings, many things and later on the EP will take stock how these promises have been materialized. This may lead to a situation that may resemble a *de facto* state of affairs with the EP somehow controlling the Council through the Presidency activities in the EP. Another practical issue is that most of the

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[19] See Fiona Hayes Renshaw "The Council of Ministers' In John Peterson and Michael Shackleton (eds), *The Institutions of the European Union* (2nd edn, Oxford University Press 2006), 73.

[20] For example Hayes Renshaw considers that "The Presidency, on behalf of the Council, is accountable to the EP". ibid, 77.

[21] Walter Van Gerven *The European Union. A Polity of States and Peoples* (Hart Publishing 2005), 360. Van Gerven finds that "the Council of Ministers is, as a body, not politically accountable at the European level".

[22] It is set out in Article 230 of TFEU that "The European Council and the Council shall be heard by the European Parliament in accordance with the conditions laid down in the rules of Procedure of the European Council and those of the Council".

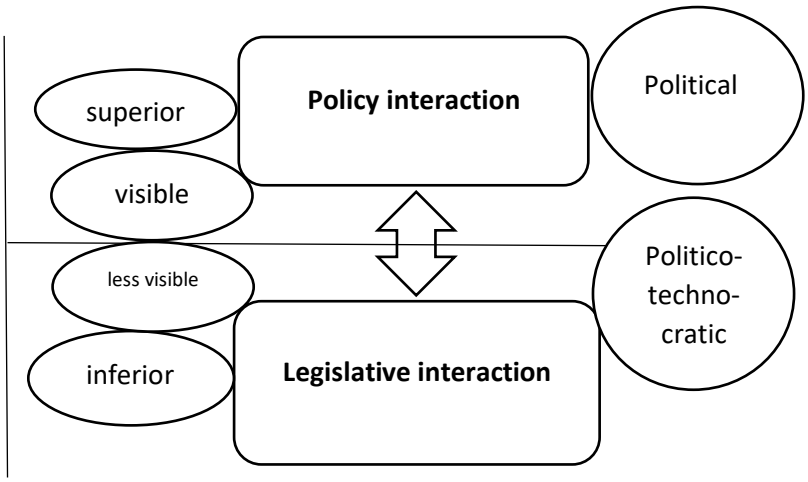
[23] In the speech of the then President of the Commission elect Von der Leyen in July 2019 and during the autumn 2019 Commissioners-elect hearings in the EP the Commission showed a great deal of understanding to the idea of EP right of initiative, which the EP has highlighted for a long time. It remains to be seen how this issue will be tackled above all in the Conference on the Future of Europe. Another important constitutional topic, which has already been concretized in an EP legislative proposal is the EP right of inquiry. The legal basis of the proposal adopted by the European Parliament on 23 May 2012 for a regulation of the European Parliament on the detailed provisions governing the exercise of the European Parliament's right of inquiry and repealing Decision 95/167/EC, Euratom, ECSC of the European Parliament, the Council and the Commission is Article TFEU 226 of TFEU. The Council has not by autumn 2020 either given its consent on the EP proposal or refused its consent. The inter-institutional handling of this particular file seems to be at the moment in a deadlock.

[24] This rule originating from business management fits particularly well to the Presidency interaction with the EP as it aims at controlling and managing the expectations for the results of law- and policy-making. This principle rather has a focus on eventual positive outcomes of inter-institutional co-operation and not their prospects.

negotiations such as trialogues physically take place in the EP more often than in the Council. This may give a "home game advantage" to the EP.

The Presidency interaction with the EP consists of legislative interaction and policy interaction. With the legislative interaction, I refer to the most concrete inter-institutional work on the preparation of EU legislation. This activity is crystallized especially in trialogues, both technical and political. Policy interaction is in this case all about high level political interaction, which occurs in the presentation of Prime Minister in the Plenary, the Council statements by the European minister in the Plenary, the meeting of the Conference of Presidents (CoP)[25] with the Government and the various ministerial appearances in the EP Committees. These two categories of interaction do not of course exist in a vacuum but are rather closely interlinked providing input to one another. One can discern between the features of these two typologies. The policy interaction is political, general and more visible in public while legislative interaction is political with technocratic elements, specific and less visible in public.[26] It is important to note that legislative interaction is subordinate to the policy interaction although these two layers are largely interdependent.[27] These elements are characteristic for the two types of interaction and they are illustrated in the figure below.

Figure 1. Two types of interaction between the EP and the Council



Why is this dichotomic model important from the point of EU law and especially the role of the Presidency? It sets the various practices of policy-making and law-making in the context main types of interaction between the EU co-legislators. It is central for the functioning of EU legislative process and it covers the whole life-cycle of a proposal for a legislative instrument up until the phase where the act concerned is adopted. This is why it can be of help for the discipline of European legislative studies.

[25] CoP is the highest political organ within the EP and it consists of the Chairs of the Political Groups. The President of the European Parliament has a pivotal role in CoP.
[26] In this context the concept of visibility has a stronger connotation of public attention than transparency.
[27] The terms superior and inferior refer to the hierarchy of the two forms of interaction. It is clear that the ministerial level interaction always is at the helm of interaction.

3.1 THE FACE OF THE PRESIDENCY TOWARDS THE PARLIAMENT – THE PRESIDENCY IN THE PLENARY

The Presidency programme will be presented in the EP Plenary usually during the first Plenary after the new Presidency has taken over. The programme and the Presidency priorities will be presented by the Prime Minister of the Presidency. Given this highest political level, the presentation will be a rather broad political outline of Presidency objectives for the new term. The presentation will be followed by comments of the Commission, usually the President of the Commission.[28] Then it is the turn of the EP political groups.[29] After the group interventions there will also be a possibility for individual MEPs to present comments and ask questions. The Head of Government presents at the end of this Plenary agenda item the concluding remarks and may answer questions. Previously the Prime Minister level conclusions of the Presidency were included on the agenda after the end of the Presidency to wrap up the results but currently this practice does not exist anymore.[30]

When the CoP of the EP sets the agenda on Thursday preceding the Plenary, which starts on Monday[31] it may ask the Presidency for Council statements and interventions on various agenda items. Furthermore, the Council is also expected to participate in dealing with the oral questions[32] and topical debates[33]. Moreover, it is also commonplace that the Presidency participates in the EP debate on the preparation of the European Council meetings on behalf of the President of the European Council.[34] In addition, the High Representative of Common Foreign and Security Policy may ask the Presidency to speak on behalf of him.

Before the CoP meeting, which sets the agenda the EP organizes a meeting of inter-institutional coordination group, which is a civil servant level meeting and is chaired by an EP high-level representative. The Presidency, the Council Secretariat, the Commission and the European External Action Service are also present in the meeting, which aims at discussing the proposed Plenary agenda and other topical inter-institutional issues. This configuration can be characterized as serving the purpose of information sharing, mainly

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[28] It is worthy of noting that in the EP Hemicycle there are separate seating blocks for both Council and the Commission representatives, see for instance Richard Corbett, Francis Jacobs and Michael Shackleton, *The European Parliament* (8th edn, John Harper Publishing 2011), 190. This highlights the physical presence of the Council and the Commission in the Plenary.

[29] Pursuant to Rule 33 "a political group shall consist of Members elected in at least one-quarter of the Member States. The minimum number of Members required to form a political group shall be 23". The current political groups of the EP are European People's Party Group (EPP), Progressive Alliance of Socialists and Democrats (S&D), Renew Europe (RE), Identity and Democracy (ID), Greens-European Free Alliance (Greens-EFA), European Conservatives and Reformists (ECR) and European United Left-Nordic Green Left (GUE/NGL). In addition to these groups there are also non-affiliated MEPs not belonging to any of the groups.

[30] This is largely due to the fact that Prime Ministers' conclusions did not attract much attention among the MEPs that was also very visible in the attendance in in the chamber.

[31] It should be noted that the Plenary may still in its opening session on Monday of the Plenary week make amendments to the Plenary agenda. This is the case with Strasbourg Plenaries and not the so-called miniplenaries in Brussels, which usually start on Wednesday afternoons.

[32] On oral questions put to the Council, the Commission and HR, see Rule 136 of EP RoP.

[33] Rule 162 of EP RoP.

[34] The President of the European Council is present in the Plenary for the agenda item on the conclusions of the European Council meetings. See Rule 132 of EP RoP. It should be acknowledged that in the common discourse in the chamber MEPs often refer to the Council as a monolithic entity even though these are two separate institutions.

from the EP to the other institutions on the upcoming Plenary. The Inter-institutional Coordination Group also often discusses topical inter-institutional issues.

In the above-mentioned categories of Council interventions, the Council will usually be represented by the European Minister of the Presidency. Representative can also be another Minister or a political state secretary. Fundamental criterion is that the representative has to be a high-level political figure, which means that high-level civil servants, such as ambassadors, cannot function as the representatives presenting interventions on behalf of the Council. Being a politically elected representative is the key criterion for qualifying as the representative of the Council in this role.

Indeed, the appearances of the Presidency at the ministerial level in the Plenary can be regarded as a token of high-level commitment of the Council towards the EP. Ministerial level interaction is policy interaction *par excellence.* It is the most political level of inter-institutional co-operation. It also meets the criteria of this typology by being very visible as EP plenaries always attract a great deal of media attention. Plenaries also have the merit of transparency because they are open to general public *i.e.* Plenaries are web-streamed. Moreover, Presidency appearances in the Plenary are in hierarchic terms superior to the different forms of legislative interaction. It follows from the need to tackle the politically most important issues in different policy areas that the nature of policy interaction is rather general in comparison with legislative interaction. Despite the distinction between these two forms of interaction, one should not omit that these two layers are interdependent providing input to one another.

For the legislative process of the EU, the Plenaries include one important yet ceremonial fringe event that is the signing of EU legislation. In this so-called lex signing the President of the EP and the European Minister of the Presidency on behalf of the co-legislators, sign the recently agreed legal acts.[35] This step is necessary for the publication of the legal instruments concerned and their entry into force.[36]

The added value of this presence can be found in the direct interaction of the Presidency with the EP and the Commission in a vast array of topical and substantive legislative and policy issues. Nevertheless, the way in which the Plenary presence of the Presidency is conducted can be criticized. The usual burden of Council interventions can be extremely heavy. Very often, the minister of the Presidency has to cover more than ten Council intervention items in one Plenary. One can very well ask if the ministerial presence could be utilized in a more effective way. It is namely not always the case that statements in official fora are the best way to co-operate in a fruitful manner. At least the number of the number of official Council interventions should be reduced and focus should be set on a limited amount of priority files. This would enable more time and resources to be utilized for advancing priority files of the institutions in informal settings. The decisive bodies in this respect are the political groups of the EP, which should consider if less could in this case in fact be more. Furthermore, the Council could be made aware of the topics that it is asked to cover earlier in order to foster a more fertile discussion.

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[35] In accordance with Article 297 (1) of TFEU "Legislative acts adopted under the ordinary legislative procedure shall be signed by the President of the European Parliament and by the President of the Council".
[36] This is a very short event where the President of the EP and the European Minister of the Presidency sign Directives and other agreed legal instruments one by one. In the lex signing also the EP rapporteurs of Directives and other legal acts to be signed are present.

Generally, the Presidency presence in the Plenary works well but it would be possible with these practical improvements to ameliorate the interaction. Another more radical idea that could bring benefit to the inter-institutional co-operation in the Plenary could be to offer the Council and the Commission a possibility to be as proactive as the Parliament in the discussion. Now, the situation is characterized by an "active" Parliament, which requests interventions from the "passive" Commission and the Council. The Parliament asks and the Council and the Commission answer. By bringing even limited practical possibilities to the Plenary for the Council and the Commission for their part to proactively challenge the EP on topical policy and legislative files could have the potential to be explored. Right level of the EP to take over these EP interventions could be for example Committee Chairs, Rapporteurs or even the Vice Presidents or the President of the EP depending on topic. The EP as the bastion of direct European democracy would work well for this kind of public two-way communication and reinforced co-operation. This could also provide input and boost from policy interaction to legislative interaction, more specifically to the inter-institutional negotiations on legislative proposals.

3.2 PRESIDENCY IN THE EP COMMITTEES

The increase of powers of the EP during the last few decades has reinforced its position in the co-operation with other key EU institutions in the consideration of legislative proposals. The development has also given rise to the increase of the related contacts between the institutions.[37] The increase of competence of the EP in the latest Treaty amendments that has brought it on an equal footing with the Council in nearly all policy areas. This has hence further strengthened the EP interaction on legislative files with the Council.

This tendency of increased contacts can be identified in particular in the ministerial appearances of the ministers of the Presidency in the EP Committees. Already before the start of the Presidency co-operation in the axis the Council-the EP may have been strengthened with a visit of the respective EP Committee to the future Presidency Member State.

Ministerial appearances in the EP Committees clearly belong to the most prominent occasions where the Council Presidency is present. Sectorial ministers of the Member State holding the Presidency present – usually during the first month of the Presidency term – the substantive priorities of the Presidency in the policy field of the respective EP Committee. The way in which the ministerial appearance will be conducted may vary according to the Committee practices[38] and the chairman of the Committee, but usually they run as follows: After the chairman's introductory remarks the minister makes the presentation on the Presidency priorities.[39] The focus will be on the most important policy initiatives and legislative dossiers but light can also be shed on horizontal Presidency objectives. This will be followed by a round of comments first from the political groups and then from individual MEPs. The minister will then comment and answer some of the most important questions.

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[37] Corbett, Jacobs and Shackleton (n 28), 270.

[38] In fact, EP Committees are in practice very independent when it comes to their internal organization and working methods.

[39] It is important to notice that the ministers of the Presidency always function within the EP structures on behalf of – and as the voice of – the Council and not their national administrations.

The format may differ from one Committee to another. For instance, some Committees may take the interventions in one go while others may take more rounds of comments. Anyhow, after this the appearance will end. Some of the Committees may ask the minister to a follow-up session in the Committee before the end of the Presidency but the practical follow-up more often takes place in the context of the advancing policy and legislative files.

The ministerial appearances of the Presidency ministers form quite a significant part of the Committee work for some time and for the Presidency, it is also a considerable strand of work towards the EP during the Presidency as it sets the primary objectives within the remit of the Committee during the six months.[40] Further, the progress achieved will be very much assessed against the backdrop of priorities set out in the ministerial appearances and how these objectives were materialized.

One can conclude that contacts between the Committee chairs and rapporteurs and the Council President-in-Office, *i.e.* the minister of the Presidency have greatly increased over time.[41] This facilitates and makes smoother the legislative work. At the apex of the law-making in practical terms is of course the co-operation between the institutions.

Ministerial appearances in the EP committees at the start of the Presidency can be considered mutually beneficial for both institutions as they launch the co-operation between the Council and the EP within the remit of the respective Committee. This form of interaction can be considered as an effective way for getting started with the most important substantive legislative files at the high political level. Organizational aspects of this interaction with limited time can always be challenging and the system may not be perfect, but it works.

A natural question is related to the follow-up of ministerial appearance afterwards. The EP Committees sometimes invite Ministers to a second appearance towards the end of the Presidency, but the Presidency is under no obligation to participate in a second such hearing. I do not deem a second hearing as useful because it may lead to a blame-game concerning the progress in the files. Instead of a second hearing, one should pursue for more constructive approaches, such as increased and reinforced contacts between the Presidency and the chairman or the rapporteurs of the Committee.

A significant fact is that there is no reciprocity in sense that sectorial Council meetings are not open to Members of the Parliament, such as rapporteurs of key files of the respective Council configuration. The same applies to the chairmen of EP Committees. In the light of the Treaties, I do not see provisions enabling this nor any practical need to engage in this kind of co-operation in the Council side. As I see it, the efforts should be harnessed to practical co-operation on concrete files between the major actors of the institutions. Further official structures and ceremonial arrangements run the risk of losing impetus in the practical work.

Similarly, to the Presidency presence in the Plenary, the ministerial presence in the EP committees is a part of policy interaction. As the Committee meetings are public, it also qualifies as transparent due to its visibility towards the general public.[42] Compared with the

[40] During the Finnish Presidency (latter half of year 2019) altogether 17 ministerial appearances were held in EP Committees in the months of July and September 2019. Usually the appearances take place during the first month of the Presidency but year 2019 was exceptional in the EP due to the EP elections in spring and the subsequent phase of the EP getting internally organized.

[41] Corbett, Jacobs and Shackleton (n 28), 270.

[42] EP Committee meetings can also convene *in camera*, *i.e.* involving only members of the Committee and the relevant EP staff with no access by other institutions or the general public.

ministerial presence in the Plenary the ministers' hearings in the Committees dig deeper into the political outstanding issues of individual EU legislative and policy files but they are nevertheless still quite general. The interlinkage between policy and legislative interaction appears in these occasions much stronger. The discussion in the Committee takes stock of past interinstitutional negotiations and proffers guidance for further co-operation in different legislative files within the remit of the substantive Committee.

3.3 OTHER ESSENTIAL FORMS OF CO-OPERATION

There are some established practices, which have taken their shape over time and today are an important part of relations between the Council and the EP. If the Prime Minister of the Member State holding the Presidency of the Council presents the priorities of the Presidency in the Plenary equally important, but not so visible is the CoP visit to the capital of the Presidency. Usually, the visit of the Commission's college attracts more attention at least in the media but CoP visit is another high-level political meeting paving the way for the Presidency. It is particularly important for upcoming co-operation between the Presidency and the EP.

Like the visit of the college, the visit of the CoP usually takes place just before the Presidency starts. The participants from the EP are the President of the EP and the chairs of the political groups. The EP delegation also includes civil servants of the EP at the highest level. The CoP will discuss currently the most important political EU issues with the Government of the Presidency during the visit.[43] In addition to presenting the priorities of both institutions, discussions are focused on the most topical political and legislative initiatives.

CoP visit is an important political meeting between the EP and the Presidency and it above all serves the purpose of establishing political contacts between the Council and the EP for the new term at the highest political level. Moreover, it helps in understanding the main positions of the institutions in the most important EU files and hence facilitates further discussion on them.

It clearly falls within policy interaction due to its highest political level status and the general level of discussion. Compared with Presidency appearances in the Plenary and the Committees the level of transparency is inferior because discussions are confidential. In spite of this CoP visit is visible as it gets media attention.

The Conference of Committee Chairs (CCC) of the EP is an organ, which deals with the coordination of work between the Committees. It is of utmost importance for internal coordination of especially horizontal EU policy and legislative files where more than one EP Committee is involved. As it is today the case, several of the most important EU files are of horizontal and cross-sectorial nature and therefore the CCC has a key role to play.

The Presidency, namely the European minister or equivalent office holder, appears in front of the CCC once or twice during the Presidency. It is most common that the Presidency makes in the beginning of the Presidency an introductory appearance presenting the

[43] CoP usually also visits the Parliament of the Member State holding the Presidency and exchanges views with major political interlocutors in the national Parliament.

Presidency priorities. At the end of the six months Presidency the minister usually goes to the CCC for a wrap-up session *i.e.* presentation of the results of the Presidency.

The CCC appearances are not public. They are not web-streamed as most of EP meetings. They are often considered as the "Presidency's substantive visit card" due to the strong substantive focus. The minister will first make a presentation on the Presidency priorities and after that, he or she will answer various questions of the Committee chairs that can come basically on any subject of EU policy. Given the very concrete approach, the issues raised in the CCC often have a close connection to the files, which are ripe for the trialogue phase. Because of this, the CCC has a great potential to work as a glue between policy and legislative interaction. Discussion in CCC gets closer to details of very concrete legislative dossiers and is therefore closely interlinked with trialogues.

It is important to note that not only contacts between the Government and European Parliament are significant. In addition, the co-operation between the EP and national parliaments is very important. This is highlighted by the reinforcement of the national parliaments in the Lisbon Treaty.[44] Furthermore, Protocol 1 included in the Treaty sets out important provisions on the role of national parliaments.[45] The most important structure between the national parliaments and the EP is COSAC (Conferérence des Organes Spécialisés dans les Affaires Communautaires). COSAC discusses EU policy issues and the meetings are hosted by the Parliament of the Member State holding the Presidency.

It can be noted that there could well be an established follow up for the interaction between the CoP and the Presidency Government. It would not be necessary to make this an official or ceremonial interaction, but less formal contact could do. It could for example take the form of a meeting between the European Minister of the Presidency and the President of the EP somewhere in the halfway of the Presidency. The Government of the Presidency and the political groups of the EP could feed into this informal meeting on the most topical and important EU dossiers. This sort of established high-level meeting could politically take issues further despite the fact that each file moves in its own sectorial channel with the sectorial Presidency Minister, the responsible Commissioner and the responsible EP Committee stakeholders.

As regards the CCC, one could recommend the CCC to focus more on the most important EU issues on the desk of the institutions. The discussion should be much more focused and the number of the topics should be much more restricted. The rather short discussion does not need to cover all the policy issues dealt with in all committees but should be zeroed in on only a few most fundamental files. Should this kind of prioritization take place CCC hearing could have an instrumental value. It is of course clear that all the

[44] The contribution of the national parliaments to the good functioning of the EU has been acknowledged in Article 12 of TEU. Furthermore, the role of national parliaments has been strengthened in relation to the access to information by national parliaments and their role in the control of subsidiarity (*i.e.* the so-called yellow and orange cards) and proportionality. Key provisions of the Treaties on these aspects can be found in and in Protocol (No 1) on the role of national parliaments in the European Union and Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

[45] The entry into force of the Lisbon Treaty on 1 December 2009 witnessed a significant empowerment of national parliaments. The EU system has sometimes been characterized even as tricameral instead of bicameral setting national parliaments on an equal footing with the European Parliament and the Council. See Ian Cooper 'Bicameral or Tricameral? National Parliaments and Representative Democracy in the European Union' (2013) *Journal of European Integration* (35:5), 531-546.

committees want to have their voice heard but a practical solution should be found to this issue.

4 LEGISLATIVE PROCESS AND TRIALOGUES

The so-called speed dates between the incoming Presidency and the EP take place usually just before the Presidency term starts. It is a series of very short meetings between the EP Committee Chairs and the representatives of the incoming Presidency. The participants in these preparatory meetings are the responsible Committee Chair of the EP, Permanent Representative or Deputy Permanent Representative of the Presidency depending on if the respective EP Committee finds its counterpart either under Coreper 2 or Coreper 1 and the representatives of the Commission.[46] It is a normal practice that also the next Presidency after the incoming Presidency attends the speed dates as an observer. One can conclude on the participation that the EP is represented at the political level although there are many EP civil servants present too, while the Council and the Commission representation consists of civil servants.

In short, the overall objective of the speed dates is to pave the way for upcoming negotiations on concrete legislative and policy initiatives in different policy sectors. Another goal of these meetings is that key stakeholders get to know each other and especially the general positions of the institutions. Knowing the positions of the actors both in the Council and in the EP as well as their interaction is crucial for comprehending the EU legislative politics.[47] The Parliament chairs these meetings and it is very much up to each chair how to run the meeting in practical terms. For the organization of the speed dates, there is no legal basis. Speed dates are rather a practice that has evolved over time with the view of facilitating the negotiations on main legislative dossiers. These closed meetings positioned in our scale in the sphere of legislative interaction be considered as an important step for the preparation of future inter-institutional negotiations, most notably the trialogues and keeping abreast of the evolution of institutions' positions on different EU policy files.

Trialogues are without a doubt the single most important phase of EU legislative process.[48] In the trialogues the EP, the Council and the Commission negotiate on the compromise texts for EU legislative instruments. The Council is represented in these negotiations by the Presidency, which is assisted by the Council Secretariat.[49] For matters

[46] Coreper stands for Committee of Permanent Representatives of the Member States of the European Union. It is stipulated in Article 16 (7) of TEU that "A Committee of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council". The tasks of Coreper are defined more specifically in Article 19 of the Council RoP. For practical reasons related to its preparatory role Coreper has been divided in two formations, Coreper 2 chaired by the Permanent Representative and Coreper 1 chaired by Deputy Permanent Representative of the Presidency. Coreper 2 is responsible for the substantive preparation in the fields of economic and financial affairs, foreign affairs, general affairs and justice and home affairs while Coreper 1 deals with agriculture, fisheries, competitiveness, education, youth, culture, sport, employment, social policy, consumer affairs, environment, transport, telecommunications and energy (meaning the issues falling under the old Community pillar).

[47] Simon Hix and Bjørn Høyland, *The Political System of the European Union* (3rd edn, Palgrave MacMillan 2011), 73.

[48] For a brief outline of trialogues, see Kim Fyhr, *Making Fundamental Rights a Reality in EU legislative Process. Ex ante Review of Proposals for EU legislative Measures for their Compatibility with the Charter of Fundamental Rights of the European Union* (Unigrafia 2016), 82-85.

[49] The Council Secretariat indeed is an important actor in the functioning of the rotating Presidency. Nevertheless, for example research on the impact of the Council Secretariat on the law-making and policy-

falling under Coreper 1 the leading negotiator is the Deputy Permanent Representative of the Permanent EU Representation of the Presidency. For Coreper 2 files usually the Council side negotiations are led by the chair of the respective Working Party, which remit the file in question falls within. In some cases, the negotiator in the Council side can be the minister or political state secretary. The counterparts, which the Presidency will face on the other side of the negotiation table, are the rapporteur and very often the Committee chair of the EP and the responsible Commissioner or Director General from the Commission.

The trialogues are the single most important part of legislative interaction. The trialogues are not public although during the last few years steps have been taken towards a greater transparency in the access to trialogue documents.[50] Trialogues include a strong legal-technical element even though they carry the political guidance all the way throughout the process.

Nowadays, the inter-institutional prioritization of legislation has been chiefly set out in the Joint declaration on legislative priorities agreed upon by the three institutions.[51] This declaration very much steers the legislative efforts of the EU. Similarly, in accordance with paragraph 5 of the inter-institutional agreement on better law-making, the institutions will also agree on the multiannual programming of legislation, which aims at enhancing continuity and predictability of EU legislation in a longer term.[52] Those two pertinent documents have an impact on the Presidency functioning in the EP.

5 PRESIDENCY AND THE COUNCIL

Coreper is the indispensable forum for the preparation of Council negotiating mandate for the next trialogue. The Working Party level can also be used for more technical examination of proposals to be presented later to the Coreper, but it is Coreper that decides on the negotiating mandate within the Council. As the Working Party level handling of a given file has reached the phase when the Presidency starts preparing a draft negotiating mandate the dossier will soon need to be taken to the Coreper. Especially in the Coreper 1 the negotiating mandate of one piece of legislation, especially in harder cases, can be discussed in Coreper in different blocks. This means that in the exploratory talks, which can also be called trialogues, the institutions identify for example four main, substantive negotiation blocks in the draft legislation, *e.g.* a Directive, at hand and in the Council side, the Presidency will start preparing mandate texts for these blocks. When the Presidency gets the mandate approved, it goes to the trialogues for negotiations with mandate as the guideline. The Presidency then returns to Coreper to report back on the outcome of the trialogue. Then there will be another

making processes has been relatively scarce. The Secretariat is a significant stakeholder also in terms of ensuring continuity of the Council work. On the role and tasks of the Council Secretariat, see for instance Westlake and Galloway (n 17), 348-354.

[50] T-540/15, De Capitani v European Parliament [2018], ECLI:EU:T:2018:167. In this judgment the General Court held that trialogues constitute a decisive phase in the EU legislative process and this is why public access to the so-called four column documents utilized in the trialogue negotiations cannot be refused.

[51] Joint Declaration on the EU's legislative priorities for 2018-19. Available at https://ec.europa.eu/commission/sites/beta-political/files/joint-declaration-eu-legislative-priorities-2018-19_en.pdf. COVID-19 crisis has postponed the adoption of a new Joint Declaration but the discussions on the new Joint Declaration are ongoing between the institutions.

[52] Interinstitutional agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-making of 13 April 2016, OJ L 123/1.

round of preparation in the Coreper, then a trialogue, to be succeeded by another report, then the preparation and so forth until the Coreper is facing a take it or leave it situation with regard to the final text negotiated by the three institutions. In practical terms, the processes can be different depending on the file. In Coreper 2, it seems to be more common than in Coreper 1 to agree on broader negotiating mandates for the Presidency, to conduct negotiations on a rolling basis and to revert back to Coreper when necessary.[53]

The Coreper agenda includes every time after the EP Plenary an item titled "Relations with the European Parliament", which is a routine-like update by the Presidency of the major developments in the latest EP Plenary. It seldom triggers any discussion given the fact that Member States are very well aware of what has happened in the Plenary usually the week before the Coreper.

In spite of the extremely important role of the Coreper level one should not turn a blind eye to the importance of the ministerial level of different Council configurations, which of course in their substantive policy areas deal with a multitude of different forms of interaction with their EP counterparts. For inter-institutional co-operation, the most important Council configuration is the General Affairs Council (GAC) due to its coordination role within the Council.[54] GAC is very often chaired by the European Minister of the Presidency who also represents the Council in the EP. These facts highlight the weight of the GAC in the Presidency highest level preparation for both the Council and the EP. From the point of view of inter-institutional relations, it is important to note that European Council preparation within the Council takes place in the GAC channel. Furthermore, the level below the Coreper, the working group level also has a significant role to play in the co-operation with the EP.[55]

If one thinks about how the consecutive Presidencies are organized, the trio Presidency has become more important than it used to be. The trio consists of a group of three Member States having Presidencies back-to-back.[56] Before the new trio takes over the three Member States in co-operation with the Council Secretariat draft the trio programme, which largely reflects the Council work programme.[57] In this context it should be borne in mind that it is the Council legislative and policy agenda that sets the Presidency agenda and not vice versa. This is despite the fact that the Presidency does have the opportunity steer the Council work according to its priorities and have an effect on the angle from which

[53] The processes presented above are simplified models and distinction between i.a. first and second readings of ordinary legislative procedure have not been made.
[54] Pursuant to Article 2 (2) of the Council RoP "The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission. It shall be responsible for overall coordination of policies, institutional and administrative questions, horizontal dossiers which affect several of the European Union's policies, such as the multiannual financial framework and enlargement, and any dossier entrusted to it by the European Council, having regard to operating rules for the Economic and Monetary Union."
[55] This paper does not present the internal preparatory proceedings of the EP and the Commission. It has been important to illustrate, however, the internal proceedings of the Council due to the significance of the necessary support from the Council to the Presidency, which is needed for the effective functioning of the Presidency in the EP.
[56] The current trio for the period 1 July 2020-31 December 2021 consists of Germany, Portugal and Slovenia.
[57] See the present trio programme of Germany, Portugal and Slovenia in Council of the European Union, Taking Forward the Strategic Agenda, 18-month Programme of the Council. 8086/20, Brussels, 5 June 2020. In addition to the trio programme each Presidency prepares a Presidency programme of its own.

different policies are approached. The trio format could also bring some further added value to the Council interaction with the EP if developed properly. With a strengthened trio programme and trio involvement in interaction it could be possible to tackle one major shortcoming of the rotating Presidency system: the relatively short duration, which leads to the need to re-invent the wheel every six months despite the existing best practices and coordination among consecutive Presidencies. This could provide a longer-term perspective and more predictability to inter-institutional co-operation of the Presidency in the EP.

6 RE-THINKING THE INTER-INSTITUTIONAL SETTING

The EP is without a doubt an important forum for the rotating Council Presidency. In terms of publicity the EP is very visible and part of the Council Presidency publicity and visibility will come through Presidency's activities in the Parliament. A question that occurs is whence this institutional setting derives? How does it relate to the institutional balance? For the Commission vis-à-vis the EP the situation is quite clear. If the Commission loses the political trust of the Parliament, it can discharge the Commission.[58] Therefore, the Commission must enjoy the trust of the EP. In this relation, parliamentarism is all about controlling the executive.[59]

For the relation between the Council and hence the Presidency the situation is fundamentally different. The Parliament does not – in light of European constitutional law – have any kind of legal nor political predominance or hegemony over the Council. This is the case despite the fact that the Parliament often seeks an upper hand towards the Council and aims to illustrate the Council as politically subordinate to the EP. This does not have any legal basis.

The Council functioning in the EP is based above all on sincere co-operation enshrined in Article 4(3) of the Treaty on European Union (TEU).[60] This applies especially to legislative proceedings, which in concrete terms are materialized in trialogues and other negotiations involving the EP and the Council. Many appearances such as ministerial hearings in the Committees and the Prime Minister's presentation in the Plenary of course also deal with legislation despite the more general nature of these activities. Thus, they are also one expression of sincere co-operation. Nevertheless, these activities are practices, which do not stem from EU primary or secondary law, but have simply evolved over time. There are, however, no equal practices for the presence of the EP in the Council. The Council has been somewhat reluctant to involve the EP in the activities taking place within the Council structures.

The on-going preparatory work on the Conference of the Future of Europe includes many important institutional topics, which will without a doubt have an impact on inter-

[58] In accordance with Article 17 (8) of the TEU: " The Commission, as a body, shall be responsible to the European Parliament. In accordance with Article 234 of the Treaty on the Functioning of the European Union, the European Parliament may vote on a motion of censure of the Commission. If such a motion is carried, the members of the Commission shall resign as a body and the High Representative of the Union for Foreign Affairs and Security Policy shall resign from the duties that he carries out in the Commission".
[59] Teija Tiilikainen, 'The Concepts of Parliamentarism in the EU's political System. Approaching the Choice between two Models' (2019) FIIA Working Paper, 4-7.
[60] Moreover, pursuant to Article 13 (2) of TEU "each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation".

institutional relations, maybe even on the balance of power between the institutions.[61] One such issue to be discussed in this exercise will probably be the EP right of initiative that has been on the EP wish list. In this question the Commission has shown a great deal of understanding for the Parliament's position.

Nonetheless, it is clear that there cannot be major inter-institutional shifts without Treaty amendments. As shown, it is possible to alter the practices that have an impact on inter-institutional relations and how the co-operation between the institutions is carried out. For bigger changes there would need to be changes in the competences that can only be made by amending the Treaties. The on-ongoing process of the Conference on the Future of Europe does not exclude this possibility although engaging in large-scale reform of EU primary law seems at least at the moment unlikely.

Placing organizationally the inter-institutional co-operation in EP as described above does have some pros. These advantages include a greater visibility due to the open nature of EP activities in particular when it comes to the plenary and most of the Committee debates. This enhances the transparency and enables EU citizens and media to follow these activities. In that sense, the EP as forum for inter-institutional co-operation can be regarded as a transparent and hence also legitimate arena for such activities.

If one considers the framework of inter-institutional co-operation consisting roughly of two dimensions – policy and legislative – interaction, we can notice that the EP has succeeded in making the Parliament a publicly visible forum for policy interaction. Different types of exchanges in this category take place in the Parliament. This system has mainly been created by EP internal decisions, most notably the RoP. One looks largely in vain for EU primary and secondary law provisions on how to arrange inter-institutional co-operation at the practical level and this is where the EP has come in with its related internal decision-making.

The position of the EP is different in the field of legislative co-operation with less such arrangements highlighting the role of Parliament. The explanation for this is that approving the EP as a forum for inter-institutional co-operation in the field of policy interaction is easier than for legislative interaction. It is easier to accept this arrangement for more general and visible political discussion than for legal drafting of EU legislation where the devil is in details.

In practical terms the EP as a central forum for policy interaction basically remains the only option, as the Council does not offer reciprocity in the participation of the EP in the Council meetings. There simply is no systematic way for the EP to participate in the Council work. This does not offer much leeway for more fundamental adjustments to the institutional setting.

For understanding the significance of the Presidency in co-operation with the EP one cannot overemphasize the importance of trialogues. The vital role of the Presidency in running the negotiations of the Council with the EP and the Commission is against the backdrop of interinstitutional setting a remarkable element. The Presidency possibility to impact the final outcome of the legislative negotiations is largely crystallized in this phase of law-making.

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[61] See Communication from the Commission to the European Parliament and the Council: Shaping the Conference on the Future of Europe. COM(2020) 27 final. Brussels, 22.1.2020.

An important issue to be observed in connection to the role of the Presidency within the frame of inter-institutional relations is the functioning in the axis of the Council and the European Council. Since the outbreak of the economic and financial crisis in 2008, the most important decisions of EU policy have been vested more and more tightly in the European Council. The immigration crisis back in 2015 and now the COVID-19 crisis have further underlined the importance of European Council. This shift has to some extent happened at the expense of sectorial Council formations and it has also had implications on the Council and the Presidency functioning in the EP.[62]

A crucial question from the perspective of EU law is can the current system of inter-institutional co-operation produce efficiently enough the necessary EU decisions and acts necessary for the smooth functioning of the Union? I strongly believe that the various forms of policy and legislative interaction can indeed successfully fulfill this objective. However, there is still room for improvement.

7 CONCLUSION

From the findings of this paper, it is possible to draw some overarching conclusions. First, the Presidency presence in different fora of the EP is a fundamental pillar of inter-institutional co-operation. It would be very hard to imagine co-operation between the institutions without a strong involvement of the Presidency in the EP.

Second, we have a made a distinction in the inter-institutional cooperation between policy interaction and legislative interaction. The topics covered in this paper mainly fall within the scope of policy interaction, which can be considered to include most of Presidency activities in the EP. These ways of interaction are largely political and more visible to the general public. It s also an arena for EP to utilize different internal practices aiming at increasing its practical powers. Even though legislative interaction is subordinate to policy interaction it is extremely important for EU policy-making. EP internal practices have not been that successful in influencing this layer of inter-institutional co-operation.

Third, the general rules guiding the Presidency interaction with the EP have been stipulated in broad terms in EU law, but many of the practices have taken their current shape because of the evolution of different practices. The main driver in this regard have been the EP RoP. It follows from this that with these practices the EP has been able at least to create an image in the public as if the Council was somehow accountable to the EP in policy interaction. This is not naturally legally speaking the case. This has at least slightly tilted the balance in power relations in favour of the EP. Approaching the issue from a theoretical point of view, it is possible to identify that a sort of spillover from the domain of practices to that of powers has taken place. It is often the case that when certain practices already exist these can well be at a later stage incorporated in the legislation, even in the Treaties. Practices tend to get a formal status.

Fourth and consequently, it might be clearer for all the institutions if the practices of regulating inter-institutional co-operation were set out in the Treaties in a more detailed way. A window of opportunity could be open should the EU go down the road of amending the

[62] The trend underscoring the role of the European Council has given rise to criticism from the EP mainly because of the generally applied unanimity requirement in the European Council. The EP generally is a strong proponent of qualified majority voting in the Council.

Treaties in the near future. Another and much easier solution would be to regulate this in the EU secondary law or in an inter-institutional agreement codifying the various practices in inter-institutional co-operation. This would bring legal certainty to this domain governed so far mainly by internal decisions of the institutions. Regulation could be useful in containing the spillover of increasing Presidency duties towards the EP. However, one should not step into the pitfall of making this regulation too rigid.

Fifth, the Lisbon Treaty has decreased the role of the rotating Presidency especially in relation to the European Council and the Common Foreign and Security Policy.[63] This can also be seen in the inter-institutional co-operation in different arenas of the EP. Even though there is now less role for the Presidency in light of the Treaties, the EP work offers a possibility for six months to play a fully-fledged role in shaping EU legislation and policies. Looking at things through lenses of the Presidency involvement in EP, such as ministerial presence in many configurations of EP work, the role of the Presidency may look even bigger than it is.

Sixth, the Lisbon Treaty has also brought new significant policy areas to ordinary legislative procedure placing the EP on an equal footing in these sectors with the Council in the EU legislative process. Most commentators consider that the winner in the Treaty reform has been the EP.[64] This has inevitably brought an extra flavour also to the work of the Presidency.

Finally, from all this we can see that the Presidency interaction with the EP is constantly evolving and the current ways of co-operation are subject to change. The impact of corona crisis has been significant also on the co-operation of Council and the EP in different fora of the EP.[65] Should this have wider consequences for the ways of co-operation of the Presidency in the EP remains to be seen.

[63] Christiansen (n 11), 238-239.

[64] Jean-Claude Piris *The Lisbon Treaty. A Legal and Political Analysis* (Cambridge University Press 2010), 235-236.

[65] In spring 2020 the EP decided to hold the Plenary sessions until July in Brussels instead of Strasbourg due to COVID-19. The plenary agendas were significantly shortened and many inter-institutional topics were temporarily dropped, which had an impact on the work of the Presidency in the EP. Organizing the Plenaries in Brussels has also been the case in autumn 2020.

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FREEDOMS OR RIGHTS? A COURT DECIDING WHILE COMFORTABLY NUMB

LYDIA KRIKI*

EU was quite a lot valiant back in 1957, when the Treaty of Rome established the dogma of free movement, paving the road for what was considered to be an economic integration. The dogma was founded on the principle of freedom relating to goods; and the subsequent EU Treaties strengthened the freedom of movement for services, persons and capital. However, they were not all the freedoms equally developed. For many years, it seemed that the European Union gave a fairly obvious advantage to the economic significance instead of focalizing on its people and the parameters of their needs. Subsequently, striking a balance between fundamental freedoms and fundamental rights has become a frequent exercise for the CJEU ever since, as well as a difficult puzzle. Bearing in mind that the digital era brings new challenges for both the circulation of commodities and the preservation of rights, the puzzle gets more and more complex: a tug-of-war between the tech-giants and our information privacy. By using the proportionality principle as its most effective weapon, the CJEU has built a convincing case-law, one step at time. However, does it really find the appropriate balance, or the conundrum is more complex than it seems? The present paper attempts to answer this question.

1 COMING TOGETHER: TRYING TO COMBINE EU'S FUNDAMENTALS

The European Union started to be built, as it is often said, 'from the rooftop'; while the rational option for setting the foundations would be concentrating on unifying concepts such as human rights considerations, the Union did not begin quite orthodoxically. The EU founding fathers chose to initiate the integration project focusing on 'a carefully limited set of economic concerns'[1], instead of working on a more human-oriented basis. The Union began to emerge as a constitutional structure after the adoption of the Maastricht Treaty in 1992,[2] where the institutional shift from the European Economic Community to European Union took place. After that, the Union started to smooth its ordo-liberal origins and to get reshaped into a constitutional entity;[3] in other words, this led European Union to become an organization based on an economic constitution. The economic constitution builds upon the idea of a state based on the rule of law (*Rechtsstaat*), where legal rules enforceable by individuals limit both economic and political power.[4] Within such a state, recourse to legal

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1 Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 American Journal of International Law, 652.

2 Consolidated Version of the Treaty of European Union (Treaty of Maastricht) [1992] OJ C191/92.

3 Craig Watson, 'Fundamental freedoms versus fundamental rights – The Folly of the EU's Denial over its Economic Core' (2016) 3 Edinburgh Student L Rev 41, 46.

4 Julio Baquero Cruz (ed.), *Between competition and free movement: the economic constitutional law of the European Community* (Oxford: Hart, 2002).

procedures serves to resolve conflicts between the political and economic spheres.[5] In that sense, such a kind of constitution would play the role of restituting the primary schism lying in the heart of the Union. A schism which could be aptly summarized under the headline 'freedoms or rights' and which emanates from the clash of two different school of thoughts. The first school advocates for the protection of economic freedoms, while the second for the institutionalization of the human rights.[6]

This clash implies naturally a lack of cohesion for the Union law and creates problems of an *a priori* hierarchy between the opposing principles. And although figuring out a possible hierarchy is a necessary prerequisite, this is not always the question. The real question that torments the European legal order is whether the whole EU structure, from the institutions' organization, to the European Court of Justice way of deciding, has favored the economic freedoms at the expense of fundamental rights. The fundamental freedoms have acquired the character of a primary rule in the EU legal context; however, they should not be given 'a higher status than that awarded to other fundamental rights and values in the Community legal order'.[7]

2 REACH OUT AND TOUCH FAITH: FROM MOVEMENT OF PERSONS TO MOVEMENT OF RIGHTS

Quite often, the fact that the fundamentals of Europe were always the economic freedoms and not the human rights, finds loyal supporters. What is argued by the defenders of this tactic, is that in the dawn of EU many freedoms were granted and fortified, enhancing the human rights status across all Europe. The EC Treaty provided for economic freedoms which were previously unheard both for natural and legal persons, as it carved the road for the imposition of a general prohibition of discrimination regarding nationality. It also introduced the principle of equal pay for equal work, designating the gender discrimination as unacceptable,[8] already in 1950s. However, as the aphorism states, 'hell is full of good meanings, while heaven is full of good works', meaning that maybe enshrinement of these principles might be nothing but the byproduct of economic calculations. At that time, the *Pays-Bas* and the Rhine province in Germany were flooded by thousands of migrants, coming from the poor South, willing enough to work in the mining sites of Wallonia and Westphalia. Allowing them to freely circulate *intra portas* was of major importance if this workforce was to be exploited. Moreover, equality of sexes was brought in for reasons lying on the side of fair competition: if women's employment was not described in the law, the avoidance of the unfair dumping of labor costs would be unachievable.[9] So, how rights-directed was EC in its first steps? The introduction of fundamental principles was not an empowerment framework, but rather a pseudo-legal move serving its own purposes.

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[5] Wolf Sauter, 'The Economic Constitution of the European Union' (1998) 4 Colum. J. Eur. L., 27.
[6] Watson (n 3) 41.
[7] Miguel Poiares Maduro, *We are the Court. The European Court of Justice and the European Economic Constitution* (OUP 1998) 166-168.
[8] Federico Fabbrini, 'Human Rights in the EU: Historical, Comparative and Critical Perspectives' (2017) Il Diritto dell' Unione Europea 72.
[9] Catherine Barnard, 'Gender Equality in the EU: A Balance Sheet' in P. Alston et al. (ed.), *The EU and human rights* (Oxford 1999) 215.

European Union had not a bill of rights for more than 50 years;[10] we cannot say that this was a *pro rights* stance in any case. The ECJ tried to act as the protector of the rights from the very beginning, but at the same time it was remarkably negative to be called a 'human rights court'. The Court spoke about the human rights gravity for the first time in *Stauder*.[11] There, it stated in a very short wording that human rights enjoy the same level of judicial protection as the rest of the general principles of Community.[12] Moreover, in its baby steps towards rights protection the Court accepted much influence from international law, as was made quite clear in the *Nold*[13] decision. It is not a coincidence that, prior to the Rome Treaty, another signing of a treaty in the region had taken place: an international law human-rights convention, the ECHR.

ECJ's innate tendency not to abide by ECHR and to fabricate normative hinders to its adoption has always been a problem for the rights protection standards inside EU. This might justify some scholars' suspiciousness to this turn of ECJ. Some of them supported that the Court reconstructed its case-law because of the competition developed between it and the Federal Courts of the Member States. In its *Solange* decision,[14] the Federal Constitutional Court of Germany seemed to 'concede' the close scrutiny of the human rights protection to ECJ; the Federal Court ruled that by then the level of the Union protection had advanced notably so the fundamental rights had not to be protected by national courts – an effective and sufficient protection was guaranteed on the Union layer.[15] The German Federal Court was challenging the European Law's supremacy for over a decade through the vehicle of human rights scrutiny. This direct contestation pushed the Court, according to some writers, to reinforce the rights framework in the Union, aiming to impose the primacy of EU law. In other words, the human rights initiatives were again side-effects of institutional self-seeking.

During the next years, ECJ through its docket expanded the rights-related case-law; however, this always happened in a way of being ancillary to something else. Many rights were recognized as being valid justifications for the restriction of the freedom of movement[16]; others were recognized because they were benefitting in parallel economic principles, as the one of pluralism in competition[17]; and a whole category of rights, them of social security, were developed as a motivation for a raise in occupation.[18]

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[10] EEC was established in 1957; the Charter of Fundamental Rights of the European Union came into direct effect in 2009.
[11] Case C-29/69 *Erich Stauder v City of Ulm* [1969] ECR I-00419.
[12] ibid, para. 7
[13] Case C-4/73 *Nold KG v Commission* [1977] ECR 00491.
[14] *Internationale Handelsgesellchaft mbH v Einfuhr- & Vorratsstelle fur Getreide & Futtermittel (Solange I)* [1974] 37 BVerfG, 271.
[15] Frank Schimmelfennig, 'Competition and community: constitutional courts, rhetorical action, and the institutionalization of human rights in the European Union' (2006) 13 Journal of European Public Policy, 1256.
[16] Case C-112/00, *Eugen Schmidberger Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR 2003 I-05659.
[17] *See*, for example, Case C-42/84, *Remia BV et autres contre Commission des Communautés européennes* [1985] ECR 1985-02545, where the Court stated that the provision of employment fell under the objectives set by TFEU for the competition, because it improved general conditions of production, especially where market circumstances were unfavorable.
[18] *See*, for example, Case C- 184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193.

Hence, does this push us to the conclusion that the ECJ' s case-law was formed as a strictly defensive one? If yes, then the legal and political commitments of the EU institutions to human rights might all be opportunistic. This can be better evaluated if we look up to the status bestowed to fundamental rights inside the EU establishment.

2.1 PROVOKING EU'S SACRED AND HOLY: THE STATUS OF FUNDAMENTAL RIGHTS

The fundamental rights had not a formal recognition as part of EU law, until the adoption of the Maastricht Treaty via what became Article 6 TEU and is now, under the Treaty of Lisbon,[19] enshrined in Articles 2 and 6 TEU. The amendments that the Lisbon Treaty brought marked a new phase in the important expansion of fundamental rights protection in the framework of EU, by inter alia, declaring the Charter to be legally binding. It also vested the Charter the same legal value with the Treaties, making it primary law.

Article 6 TEU under its current form identifies a three-pronged approach to the EU system of fundamental rights: (i) the Charter of Fundamental Rights elevated to the same status as the Treaties, (ii) the article urged for EU accession to the European Convention on Human Rights (ECHR) and, (iii) provided a reaffirmation of the general principles of Union law as a source of fundamental rights, taking into account the ECHR and the constitutional traditions common to the Member States.[20]

But the changes are not evident only in the legislative field: the case law is also full of examples where fundamental rights considerations have determined (or at least affected) the outcome of the case.

2.1[a] Freedoms and Rights: Should We Attempt an Equation?

Despite the legal gravity the rights may have to the course of a legal decision, skepticism still exists towards their usefulness in the ranks of EU jurists. In reality, all the factors championing for the fundamental freedoms' promotion think that the same level of social protection could be afforded through the common market's integration,[21] and that this protection would be more efficient than the one achieved through the fundamental rights use. Fundamental freedoms ensure an inherent respect to the equality principle which, if applied by all Member States, will serve as an appropriate substitute for the rights protection. However, this thought hides a logical fallacy: the supporters of such ideas forget that the fundamental freedoms and the fundamental rights regulate two different fields of the spectrum of the human comportment. While the freedoms are dedicated since their very creation to regulating and liberating the economic, exoteric activities the individual carries out, the rights always serve the purpose of safeguarding an intrinsic value the human being

[19] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01.
[20] Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) Human Rights Law Review 650.
[21] Advocate General Poiares Maduro wrote in his opinion for *Viking* case: 'Free movement rights protect market participants by empowering them to challenge certain impediments to the opportunity to compete on equal terms in the common market. Without the rules on freedom of movement and competition, it would be impossible to achieve the Community's fundamental aim of having a functioning common market'. See C-438/05 Opinion AG Maduro ECR [2007] I-10779, para. 33.

bears by the mere fact of being borne as such. These two spheres are not overlapping, but only in a very small scale: where the self-fulfillment implies the exercise of an economic initiative. In any other case, these two categories are clearly distinctive in an Aristotelian sense[22]: freedoms head towards potentiality and try to make it effectuated; rights are referred to the actuality of the person and his unique quality he carries naturally, i.e. dignity.

The analogy between the two fundamentals of the European legal order can be seen through the prism of philosophy in a broader sense. In other words, if we want to come to a conclusion about the statement 'fundamental freedoms can be considered as fundamental rights themselves' we should examine it according to a philosophical concept serving as the measurement, i.e. the *egalitarian* conception of justice.[23] This conception was expressed by John Rawls and its theory of justice, which set eyes on justice as fairness. According to it, the two principles of justice, summarized in a request for equal rights and one for elimination of social inequality, stand in a lexical hierarchy, where the first one is lexically prior to the second. If someone brings this theory into the EU legal environment, then he would be able to distinguish between the situations in which the Treaty freedoms protect equality of opportunity and the situations where they protect market access in a larger framework.[24]

In the cases where the Treaty freedoms prohibit national measures which are of discriminatory nature, such as the measures which impose a double regulatory burden,[25] they can be considered as fundamental rights promoting the principle of fair equality of opportunity. Accordingly, if we accept Rawls' lexical hierarchy between the two principles, we come to the conclusion that the hierarchy is rather reversed to the one the ECJ suggests: the fundamental rights associated with the first principle of justice take precedence over the Treaty freedoms and the principle of fair equality of opportunity. Only if we choose to reject this order, we assume that we might accept the Treaty freedom as equivalent to the fundamental rights.

Coming briefly to a second point, the Treaty freedoms when prohibiting national measures which are not discriminatory, but have a limitation effect on the EU market, cannot be seen as fundamental rights. Under this function the Treaty freedoms aim to guarantee the competitiveness of the markets of the Member States: this goal is not an interest justifying the freedoms to be awarded the status of fundamental rights. However, is this broad-market access test really what the Court relies upon? In this aspect, the ECJ case law lacks coherence.[26] And despite the fact some contend the Court has abandoned the *Keck* formula relating to the type of rules affecting the trans-national trade, this is not true.[27]

After the line of thought exposed before, it is evident that whenever the Court relies on a broad market-access test, it should not claim for the Treaty freedoms a status

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[22] See Aristotle's Metaphysics, Chapter 12: Actuality and Potentiality, Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/entries/aristotle-metaphysics/>, accessed: 27 February 2020

[23] MIT University, *Rawl's Theory of Justice II: The Study Guide of MIT* <http://www.mit.edu/~rdoody/Econ%20Justice%20ER41%202016/RawlsJusticeII.pdf> accessed 1 March 2020.

[24] Nik J. de Boer, 'Fundamental Rights and the EU Internal Market: Just how fundamental are the EU Treaty Freedoms? A Normative Enquiry based on John Rawl's Political Philosophy' (2013) 9 Utrecht Law Review, 150.

[25] Commission, Report of the Expert Group, Models to reduce the regulatory burden on SMEs, 15.

[26] Jukka Snell, 'The Notion of Market Access: A Concept or Slogan?' (2010) Comm. Market L. Rev., 467.

[27] Eleanor Spaventa, 'From Gebhard to Carpenter: Towards a (non)- economic European Constitution' (2004) Comm. Market L. Rev, 10.

hierarchically equal (or superior) to that of fundamental rights. It would be wiser for the Court to apply the Rawls-based differentiation between the two versions of the Treaty freedoms. In consequence, following the abovementioned interpretation, the answer to our initial question is negative: the EU fundamental freedoms cannot serve as fundamental rights themselves. Implementing the concept of 'primary social goods' under the Rawlsian social welfare function, it becomes evident that, as the freedoms serve an 'opportunity-open-to-all' purpose only under circumstances, they cannot rank as high as the fundamental rights in the value scale of a legal order.

2.1[b] Equalizing Means Confusing: Simplistic Approaches

It is not uncommon for the discussed concepts to be subsumed under a single, undifferentiated status and crushed by a convenient, 'one-fits-all' manipulation. Indeed, the Court itself has been trapped many times before in this simplistic schema, as it insists to take a unified normative approach. Unfortunately, this approach undermines structures in every level – national or supranational. ECJ now requires that all state institutions and state law conform to European free movement norms, but also that the particular actions of individual unions do as well – even for particular individuals.[28]

According to Lasser, there are two ways of conceptualizing the problem created by the ECJ's unified approach to fundamental rights and freedoms: the first one is to think of it as the 'microscope problem'.[29] The Court chooses to focus on the 'micro-level' to search into a particular act of a very specific private actor and its possibility to breach the standards set by the free movement principles. This leads the Court to work in a level of high specialization, but also somehow to exclude the valuable context of any case. Any action brought before ECJ is part of a larger problem and functions as an indicator of an anomaly in a more general relations structure. If the Court chooses to interpret particular sides of these complexities (especially if these are closely linked to any domestic law regulations), it fails to see the bigger picture and ignores intentionally the useful surroundings.

The second way to conceptualize this more general problem is to draw an analogy with administrative management. If someone chooses to see each district as a distinct unity isolated from the rest of the population, he might succeed a high grade of individualized solutions, achieving efficiency and productivity. However, the problem remains: the courts fail to face up the disputes as systemic difficulties, and they prefer to parcel out the different kinds of conflicts, ending up to a 'piecemeal' consideration of the legal order. After all, the commentators themselves admit that the Court's consistent position is a *case-by-case* approach, implying that this choice entails more efficacious answers. What they overlook, however, is that this approach may lead to arbitrary results. Taking into consideration that the majority of the EU Member States are Civil law legal orders, where the whole legal system appears to be a mosaic of many different elements (private, public, criminal, international or civil law are seen as discernible fields),[30] the ECJ' s practice is proved to be in conflict with this mentality: the EU Court continues to zoom into each individual fragment of the mosaic,

[28] See Case C- 281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-04139.
[29] Mitchel Lasser, 'Fundamentally Flawed: The CJEU's Jurisprudence on Fundamental Rights and Fundamental Freedoms' (2014) 15 Theoretical Inq L 229, 253.
[30] ibid, 254.

insisting that it conforms independently to a given rule. Such a short-sighted point of view damages the main advantage of the mosaic, i.e. its normative richness, which offers a panorama of solutions, generated by its heterogeneity.

Viking and Laval cases

One of the judgments where this was aptly depicted, is the *Viking* case.[31] In this case, the two concepts clashing were the fundamental freedom of establishment, enshrined in Union law, and the fundamental right to collective action, under the Finnish national law. The judgment focused on whether the workers' union fundamental rights on collective action infringed the company's fundamental freedom to move its registered seat within the EU, and on what lengths this what justified or not. The result was admittedly disappointing: the Court saw with suspicion the collective action and proceeded to a draw a picture of the social rights as the ones being instrumental, without carrying value on their own terms.[32] That was a quite alarming outcome from a fundamental rights perspective: implementation of the horizontal effect of Treaty provisions on trade unions would facilitate their potential liability which was extended to the free movement of services and establishment field.

On the other hand, this analysis has never been conducted so far in the opposite direction: there is no example in the ECJ' s case-law where the judiciary investigates the possibility of a firm's fundamental freedom of establishment to entail an infringement on the unions' right to strike – justified or not. This absence strongly indicates a 'hidden' hierarchical structure in the EU legal system, since the Court systematically treats rights as the derogation to the rule, not as an equivalent rule opposing another. If we combine this mindset with the strict scrutiny of the fundamental rights exceptions the Court imposes, then no 'fundamental' status characterizes fundamental rights. The situation grows more problematic if one takes into consideration that the Court does not explain this option and it never address the question of why it applies the proportionality analysis asymmetrically.[33] The result of this condition is a 'protective shield' to be created for the liberal market freedoms, since they have not to face the normative obstacles and the preconditions to their application the rights have to supersede from their part. The status emerging is that the one type of rule enjoys a kind of immunity, as the second type of rule plays the role of its supplement. The *Viking* case exemplifies this practice: the Court is not even bothered to expose in its reasoning the incentives for its choice to promote the freedom of establishment instead of the right to strike.

A similar line of argument was followed in another decision regarding collective workers' rights in the EU: the *Laval* case.[34] There, the Court stated as follows:

> The fundamental nature of the rights to take collective action is *not such as to render Community law inapplicable to such action*, taken against an undertaking established in

[31] Case C-438/05 *Transport Workers' Federation and Finnish Seamen's Union v. Viking Line and OÜ Viking Line Eesti* [2007] ECR I-10779.
[32] Tonia Novitz, 'A Human Rights Analysis of the Viking and Laval Judgments (2008) Cambridge Yearbook of European Legal Studies, 561.
[33] Lasser (n 29) 247.
[34] C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

> another Member State which posts workers in the framework of the transnational provision of services.[35]

Accordingly, it concluded that the fact that industrial action aimed at obtaining terms and conditions which went beyond the minimum established by law made it less attractive for undertakings to carry out its business in the Member State: therefore, it constituted a restriction on the freedom to provide services, guaranteed under the Treaty. Consequently, industrial action to impose terms in the absence of legally enforceable national provisions, could not be justified under EU law. This decision also drew heavy criticism, as *Viking* did: for many, these decisions' verdict meant a significant opportunity was given to social dumping and unfair competition, respectively.[36]

And even for those stating that the level of protection offered by the freedoms would sometimes be considered to serve in social justice's favour, the answer came directly from the EU institutions themselves: after the two judgments of *Viking* and *Laval* came to the light, a resolution was adopted by the European Parliament in 2008,[37] emphasizing that

> The freedom to provide services is one of the cornerstones of the European project; however, this should be balanced […] against fundamental rights and the social objectives set out in the Treaties, and […] against the right of the public and social partners to ensure […] the improvement of working conditions.

The resolution made a reference to the Charter of Fundamental Rights, too, since collective bargaining and collective action are expressly enshrined in it.[38] To many States' disappointment, the Council and the European Commission felt no need to react in an analogous way to the Court's developments, but since the Parliament, the organ which is the epicenter of democratic control in the Union[39] did so, it held more gravity.

2.2 THE BALANCE EXERCISE IN THE NEW CONTEXT: PROPORTIONALITY AFTER THE CHARTER

Since the aforementioned case-law was produced before the Charter of Fundamental Rights of EU come into force, it is also necessary to examine if the adoption of the Lisbon Treaty made any crucial difference for the way the fundamental rights were treated in the EU legal context. As already said, a new impetus was given by the Article 6 TEU, which signifies the Charter's binding force and declares that the latter codifies the ECJ case law, referring to fundamental rights as general principles of Union law. Subsequently, the real question emerging after that is whether the Charter is nothing but a simply codifying document, a

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[35] ibid, para. 95 (emphasis added).
[36] Catherine Barnard, 'Social Dumping or Dumping Socialism?' (2008) 67 The Cambridge Law Journal 262.
[37] European Parliament Resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)).
[38] ibid, para. 1.
[39] Katrin Auel and Berthold Rittberger, 'Fluctuant nec Merguntur. The European Parliament, National Parliaments and European Integration' in J. Richardson (ed.), *European Union, Power and Policy-making* (Routledge, 3rd ed., 2006)125-129.

synopsis of already known general principles, or if it is a self-standing source of law, bearing its own added value.[40]

2.2[a] ECJ: The Girl with Kaleidoscope Eyes

In general, the Charter could be described as a more expanded collection of the rights already contained in the various European and international conventions and the Members' national constitutions. The novelty compared to other similar texts is that the Charter introduces a division between 'principles' and 'rights.' More specifically, Article 52 of the Charter reads as follows:

> The provisions […] which contain *principles* may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States.... They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality.[41]

The provision proved to be much contentious and vague, some of the commentators proposing that it was implying some of the provisions to be 'only programmatic principles and not judicially enforceable rights.'[42] The Court has not yet bring in its view on this rivalry in any of its fundamental rights judgments: it had the opportunity to address this question in the *Yoshida Iida* case,[43] however no link with EU law could be established within the meaning of Article 51 and the Court dropped the case.

Similarly, in the *Ruiz Zambrano*[44] case the Court did not deal with the applicability of the fundamental rights. And despite the fact that Advocate General Sharpston opined for the extension of the application of fundamental rights to situations in which the EU is competent to act,[45] irrespective of the type of competence or its actual exercise, no answer was given regarding this subject.

What did not happen for the fundamental rights, however, happened for a freedom 'disguised' as right: the freedom to conduct business. This freedom is enshrined in the Charter itself,[46] therefore being vested a more constitutional attire comparing to the other economic freedoms of the Union law. Nevertheless, and despite the fact that it is named as a freedom, it 'bears the signs of a principle in the sense of Article 52(5)'.[47] This being the situation, the Court did not abstain from the interpretation of an economic principle, while

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[40] See European Parliament, Conclusions of the Cologne European Council (June 1999). There, it becomes clear that the European Council gave the mandate for a Charter which would consolidate what was existing, not for creating anything new.

[41] Article 52(5) of the Charter of Fundamental Rights of the European Union.

[42] Francesca Ferraro and Jesus Carmona, 'Fundamental Rights in the European Union: The role of the Charter after the Lisbon Treaty' (2015) European Parliament Research Service, https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS_IDA%282015%29554168_EN.pdf (emphasis added).

[43] Case C-40/11 *Yoshikazu Iida v Stadt Ulm* [2012] EU:C:2012:691.

[44] Case C- 34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* (ONEm) [2011] ECR I-01177.

[45] Opinion of AG Eleanor Sharpston, Case C- 34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* (ONEm) [2011] ECR I-01177, para 163.

[46] Article 16 of the Charter of Fundamental Rights of the European Union.

[47] Xavier Groussot, Gunnar Thor Petursson, Justin Pierce, 'Weak Right, Strong Court – The Freedom to Conduct Business and the EU Charter of Fundamental Rights' in S. Douglas – Scott and N. Hatzis (eds.), *Research Handbook on EU Human Rights Law* (Edward Elgar, 2019) 6.

it did not do the same for a right. Consequently, in *Scarlet Extended*, it did not hesitate to rule on the application of Article 52(1) of the Charter and the limitations imposed on the freedom to conduct business.[48] The Court concluded that the latter was violated by an injunction aiming at protecting the intellectual property rights enjoyed by copyright holders.[49] In such a way, the Court reached another method for horizontality to be achieved. By virtue of Article 16 of the Charter, private actors are able to enjoy more explicitly the protection of their autonomy, as public regulation is seen as a restriction and the private parties are relied on the freedom to conduct business in order to develop their economic initiatives.[50] This might lead one to think that Article 16 is a Trojan horse for the fundamental rights: the freedom to conduct business becomes a constitutionalized liberal concept, attaining an upgrade of the economic principles to fundamental rights. The case of Article 16 adds a new element to the relationship between the two fundamentals. It is the vivid example of the freedoms not only suffocating rights, but also substituting them. This change alters the balance between freedoms and the social rights, as the principles, vague to their concept, are most of the times colored with liberal contours and they do not remain ideologically neutral.[51] This further supports the conclusion that the Court resorts to odd techniques in order to serve EU's financial – driven purposes. Except from having a corrosive effect on the fundamental rights status, this also raises questions for the usefulness of the introduction of the Charter itself.

According to the author's view, in EU we were witnesses of a legal paradox: the enactment of the Union's bill of rights had, in fact, a chilling effect on the application of the fundamental rights. And the example of the freedom to conduct business is not the only indicator; since Article 51 demands for its application only in case the Member States act implementing EU law, this means an extremely restrictive interpretation for the fundamental rights access to the EU legal order. Respectively, the Court has adopted a varied approach to the application of the Charter to national rules: when the internal market connection seems to be stronger, the Court is more willing to assert its jurisdiction and apply Charter fundamental rights to national rules, using them as a tool to strengthen internal market rights.[52] Again the balance between the EU's fundamentals is disrupted and the rights are instrumentalized for freedoms' sake. On the contrary, when the internal market connection is weaker (even when there is a clear connection to EU law, such as in citizenship cases), the Court is far more reluctant to impose fundamental rights standards on national rules. Both the case law on coordinating legislation and the case law on Article 51 of the Charter seem to depict a subservience of EU rights to the interest of EU integration – at least in relation to the application of the Charter to national rules.[53]

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[48] Case C-40/11 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECR 2011 I-11959.
[49] ibid, paras. 47-49.
[50] Dorota Leczykiewicz 'Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?' in U. Bernitz et al. (eds.), *General Principles of EU Law and European Private Law* (Kluwer, 2013).
[51] Joxerramon Bengoetxea 'Principia and Teloi', in Samantha Besson and Pascal Pichonnaz (eds.) in collaboration with M.-L. Gächter-Alge*, Principles in European Law – Les principes en droit européen* (L.G.D.J, 2011) 83.
[52] Directorate-General for Internal Policies, Policy Department C (Citizens' Rights and Constitutional Affairs), The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures, Study for the PETI Committee (2016) 32.
[53] See Case C- 399/11, *Stefano Melloni v Ministerio Fiscal* [2013] EU:C:2013:107.

Moreover, from a procedural standpoint, the Court recognized the command to conciliate rights with freedoms, by imposing a shift in the burden of proof. This was translated into that, unlike to what the ECHR asks for, they are the rights defenders who have to justify their actions and prove that the restriction due to the rights exercise is justified. If the situation was reversed and they were the freedoms advocates who should prove that any restriction of human rights is acceptable, we would be justified to think that the rights are the rule and the freedoms the exception. But the Court once more, chooses to cast a vote for the opposite, as we contended in the previous sections.

The Court has many times reiterated the phrase which summarizes its steadfast position: 'we are not a human rights court'.[54] Its reluctance to admit itself as a human rights jurisdiction has been going on even after the inauguration of the Charter in the EU territory: the Court confirmed this stance in the Opinion 2/13,[55] and follows constantly a frustrating interpretation of the Charter's horizontal provisions.

As Brown has said: 'the language of breach of economic rights suggests that it remains something which is at the heart wrong, but tolerated, which sits rather uneasily with the State's paramount constitutional obligation to protect human rights.'[56] After this observation, it is not a surprise that there are academic voices[57] noting that 'viewed from this perspective the EU may indeed not yet have been fully transformed into a Human Rights Organization'.[58] The only thing the EU has achieved so far is to merely incorporate fundamental rights in its free movement theory and build a human rights 'dimension' of the internal market. The fundamental freedoms were always the core;[59] the rest ingredients of the EU legal order were developed as their necessary concomitants. Even citizenship was always the *addendum* of the four freedoms: anti-Brexit rhetoric in the dawn of Britain's leave from EU echoed the mentality that, away from Europe and its economic integration, no Europeanness is conceived.[60] European Union is an economic union; if the economic benefits are lifted, there is no such thing as European citizenship.

These developments lead us to deduce the conclusion that the Charter of Fundamental Rights aims at highlighting the fundamental rights mainly in relation to acts of the Union institutions: the application of the Charter in relation to the acts of the Member States is meant to be a simple codification of existing case law. Member States when exercising discretion in a field occupied by EU law are bound by their national guarantees, so the domestic fundamental rights should be the main source of protection against acts of the

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[54] Daniel Sarmiento, 'A Court that Dare Not Speak its Name: Human Rights at the Court of Justice', *EJIL TALK* (2018) <https://www.ejiltalk.org/a-court-that-dare-not-speak-its-name-human-rights-at-the-court-of-justice/> accessed 16 December 2020.

[55] Opinion 2/13 pursuant to Article 218(11) TFEU [2014] EU:C:2014:2454.

[56] Christopher Brown, 'Case C-112/00, Eugen Schmidberger, Internationale Transport und Planzilge v. Austria, Judgment of 12 June 2003, Full Court' [2003] 40 Comm. Market L. Rev., 1508.

[57] See, for example, Sybe A. de Vries, 'Tensions within the internal market: The functioning of the internal market and the development of horizontal and flanking policies' (2006) 9 Utrecht L Rev, 187.

[58] John Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution' (2006) 12 European Law Journal, 38-39.

[59] Wolfgang Münchau, 'Europe's four freedoms are its very essence' Financial Times (12 Nov 2017) <https://www.ft.com/content/49dc02dc-c637-11e7-a1d2-6786f39ef675> accessed 11 October 2020.

[60] Paul Taylor, 'How Brexit made me a citizen of nowhere' (20 May 2018) <https://www.politico.eu/article/how-britain-made-me-a-citizen-of-nowhere/> accessed 11 October 2020.

Member States. The Charter should function as the main tool for the EU institutions; for the national authorities it would serve only as a safety net.

2.2[b] National Identity Factor: Endless Rain into a Paper Cup

There is an actual danger in case of a broad application of the Charter to national measures for an important loss of national autonomy and sovereignty, and also of the constitutional diversity, which forms part of the national identity of each State.[61] The Court does want to avert this danger and this is the reason it keeps having a more prudent stance. It is true that it is not always receptive to fundamental rights discourse – it rather advantages the integration goals instead. The *Viking* case, as mentioned before, is an example of this Court practice: in this case, applying the combined effect of the application of the Treaty free movement rights and the substitution of the EU standard of fundamental rights for the domestic one, had the effect to weaken rather than strengthen the protection of non-economic rights in the national level.

In total, this conservative, self-confined approach by the Court seems to annul all the efforts set forth through the consolidation of the Charter text as primary law in the EU legal context. If this continues, then the fact that the Charter is strictly binding along with the founding treaties will be void letter and the text will be stripped down to a declaratory instrument. A broader application of the Charter should be promoted: the EU citizens (i.e. the Union's *demos*)[62] do have the expectation from the European Union to afford them not only economically-oriented rights, like the ones linked to free movement; a common standard of protection along the Union is also desirable.[63] Also, the Charter can be seen as the 'constitutional glue' in a Union with obvious signs of fatigue originating from a mechanistic integration, driven by mere fiscal goals; the recent financial crisis proved this.[64] If the Charter takes part in such a kind of effectiveness, it will play a wrong role weakening instead of strengthening the protection of the individuals.

Not so many things have changed in relation to the Court's methodology applying its famous 'proportionality test', after the Charter's enactment. The main tendency is a soft implementation, allowing the national court to protect a national constitutional standard against the European principle of free movement. Tridimas calls that the 'integration model', based on value diversity which views national constitutional standards not as being in a competitive relationship with the economic objectives of the Union, but as forming part of its polity.[65] The idea was confirmed by the Court in the famous case *Sayn-Wittgenstein*[66], which

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[61] Article 4(1) of the Treaty on the Functioning of the European Union.
[62] Mette Jolly, 'A Demos for the European Union' (2005) 25 Politics 1, 12-18. Also, see Mehreen Khan, 'In search of the European Demos' <https://www.ft.com/content/b6ca7e8a-0004-11e8-9650-9c0ad2d7c5b5> accessed 23 January 2018.
[63] Opinion of Advocate General Sir Francis Jacobs in Case C-168/91 *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsam* [1993] ECR I-01191. Also see Francis G. Jacobs, 'Human Rights in the European Union: the Role of the European Court of Justice' (2001) ELRev 331.
[64] Matt Phillips, 'Europe doesn't have a debt crisis – it has a democracy crisis' (7 Jul 2015) <https://qz.com/445694/europe-doesnt-have-a-debt-crisis-it-has-a-democracy-crisis/> accessed 1 March 2020.
[65] Takis Tridimas, *The General Principles of EU Law* (OUP 2006) 338.
[66] Case C-208/09 *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* [2010] ECR I-13693.

made a special reference to the Article 4(2) TEU mentioning the obligation the Union has to respect the national identities of the Member States, including their status as a Republic.[67]

The reason of these choices of the ECJ may lay on the idea that there is an equivalence of protection throughout the various Member States – however, is there any possibility for the EU institutions to enforce this believed standard of protection? The application of the nuclear provision of Article 7 is not of any importance so far – so how the EU central organs safeguard the fundamental rights across the Union? The only solution seems to be a more courageous implementation of the Charter by the Court in the cases that definitely fall under the EU law scope, and a possible expansion to what is considered to fall under it. Until Member States cannot guarantee a satisfactory level of fundamental rights protection then the EU instruments should be used in a larger amplitude, for an appropriate level protection to be achieved.

However, the most realizable suggestion came from Advocate General Trstenjak, in her Opinion in the case *Commission v. Germany*.[68] There, Advocate General recommended a more 'truth-lies-somewhere-in-the-middle' kind of solution, as she tried to include a bidirectional test of proportionality. In other words, according to Advocate General, it is necessary to examine not only whether the restriction of a fundamental freedom for the benefit of fundamental rights' protection satisfies the proportionality test; also, one should examine whether the restriction of a fundamental right for a fundamental freedom is appropriate and necessary. This is a 'double proportionality test', constituting an attempt to cover both the ends of the normative spectrum. A quite similar formula was chosen to be followed in the *Schmidberger* case, where the national authorities of Austria were given a margin of discretion regarding the demonstration under discussion. They could assess the impact of the demonstration to the free movement of goods themselves, and also consider the effect of this possible banning on the fundamental rights of speech and assembly.

It is more than obvious that this suggestion bears the sperm of the third element of the proportionality test, the *stricto sensu* proportionality, offering an approach which is closer to the true meaning of 'balancing'. An effort close to this approach was made by the Court also in *Volker & Schecke* case,[69] in conjunction with Article 52 of the Charter.

In any case, a proposal like this, far more well-balanced than the previous one systematically applied by the Court, is pretty much welcome. Resorting to an ad hoc approach, with no stable and consistent standards, offering no guarantees and ending up to undermining the rights aspect in almost every time, is not a solution anymore. The Court has to wake up and see the truth: it may be not a 'human rights court', but EU legal order is now transforming into a human rights order. It has to synchronize its methods with this reality.

3 AND THE WAVES THEY GET SO HIGH: FRESH NEW CHALLENGES

The assessment procedure described above was inherently flawed, as it entailed personal opinion intrusion to a large extent and it bore the risk for arbitrary decisions, taken according

[67] ibid, para. 92.
[68] Case C-271/08, *European Commission v Federal Republic of Germany* [2010] ECR I- 07091.
[69] Cases C-92/09 and 93/09 *Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen* [2010] ECR I-11063.

to non-transparent and peremptory tests. However, what can be noted is that the same problem was also detected in the reverse balance procedure, i.e. in the course of a horizontal application of the four freedoms rule.

3.1 IT'S DECREED THE PEOPLE RULE: THE SOCIAL INCLUSION PROBLEM

As the EU law was unfolding its normative power in the framework of a market mainly, what was evident from the first days of the EU edifice was that the free movement provisions had to be directly applied to the private operators of the market. This led to the free movement law to be applied to the actions of private parties. And while their vertical effect was always self-evident, the extent to which the four freedoms were influencing private parties' position was a controversial matter. Driven by the need for effective and uniform application of the four freedoms dogma, the Court held in *Walrave and Koch*[70] that the 'freedoms set of rules would be applied to actions coming from private parties and aiming at regulating in a collective manner gainful employment and the provisions of services'.[71] For this application to take place, the actions had to fall under the category of employment or services in a collective manner. Also, the Court set the criterion of the abstention from a statist view: the obstacles to free movement had to be the derivative of 'the exercise of legal autonomy' of private parties. In other words, this meant that the private party had to be in a position of independence from other institutions.

However, this approach showed a kind of assessment which was identical to the one the Court implemented for the rights, as previously indicated. In a 'backwards' stream of thought, the Court was identifying the restriction, and then used it to justify the direct effect of the free movement provisions.[72] No independent evaluation of the direct effect issue was involved. In other words, the Court was extremely eager to intervene in freedoms' favor· however, this intervention was fluent, variable and totally one-sided. On the other hand, as unreasoned as it was, such an intervention seldom happened for the rights' safeguarding.

3.1[a] Horizontal Application: Bauer

That this be, the question is what could be done for the rights' easier direct implementation. If we closely examine the human rights system in the EU framework, we can come to the conclusion that there is an available mechanism which can strengthen their implementation. The horizontal applicability of the rights is an apparatus borrowed from the international law field; however, its utility on an EU-level is indisputable, since in the Union environment, many non-State actors are in a position to greatly affect individuals' benefits resulting from their rights.

ECJ has many times come across the horizontal application question, however the question was always closely interwoven to the chapter of the possible direct effect of directives. More specifically, the Court in 2005 attempted a leapfrog ahead: despite the fact that until then it did not perceive the problem as such, in the *Mangold* case it ruled that

[70] Case C-36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others* [1974] ECR 1974 01405.
[71] ibid, paras 17-18.
[72] Barend v. Leeuwen, 'Rethinking the Structure of Free Movement Law: The Centralisation of Proportionality in the Internal Market (2017) 10 European Journal of Legal Studies', 251.

directives which embody an EU law principle can produce a direct effect and consequently can be invoked in a private parties' relationship.

This innovative development stirred up many discussions in the legal sphere, the main of them being 'is the Mangold effect still applied if the Directive concretizes a provision of the Charter?'.[73] The Court gave its first answer on the subject in *AMS* case.[74] There, the bench ruled that a Charter provision (Article 27 in the present case) could not be a directly applicable piece of legislation, and its particularization by a Directive could not justify the *Mangold* rationale. The pretext for this exclusion was a mind game from the Court's part: it contended that in *Mangold* the general principle could be directly invokable, since it was the requirement for no discrimination on the grounds of age. On the contrary, in *AMS* the provision of the Charter was not by then invokable, as there was no further legislation to enact it. It was also involved in a rather dishonorable series of arguments, implying that Article 27 of the Charter being discussed in *AMS* was not a right according to Article 51(2) of the Charter, but rather a 'principle'. However not clearly stated in the decision text, this reasoning outlined the picture of a supranational entity which does not have the strength to utilize the prerogatives yielded to it from the Member States, and only abandons itself in a self-consuming, empty legalism.

Fortunately, later on, the Court seemed to rephrase its position taken in *AMS*. First, in the *Egenberger*[75] *case,* the Court underlined the horizontality's importance, stating that the prohibition of discrimination 'is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law'.[76] However, the court has an obligation to balance competing fundamental rights of both parties to the dispute, so the fundamental rights of one individual are limited by the fundamental rights that may be derived from the Charter by other individuals.[77]

This line of thinking was preserved and further reinforced in a subsequent ruling, in respect with the area of employment and social fundamental rights, traditionally managed with caution and circumspection by the Court. In *Bauer*,[78] the Court examined the horizontal applicability of Article 31(2) of the Charter (the right to paid annual leave) and it came to the conclusion that this provision is of a mandatory and unconditional character. According to the ruling, workers can rely on such a right in disputes between them and their employer in a field where EU law applies, and therefore is in the scope of the Charter.[79] The mere fact that the Charter is in principle directed to the Member States and the EU institutions does not mean that it precludes the application of it to the private parties' level.[80] With its ruling

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[73] Daniel Sarmiento, 'Sharpening the Teeth of EU Social Fundamental Rights: A Comment on Bauer' (2018) Despite Our Differences Blog, available at: <https://despiteourdifferencesblog.wordpress.com/2018/11/08/sharpening-the-teeth-of-eu-social-fundamental-rights-a-comment-on-bauer/>, accessed 11 October 2020.

[74] Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* [2014], EU:C:2014:2.

[75] Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* [2018] EU:C:2018:257.

[76] ibid, para 76.

[77] ibid, para 80-81.

[78] Case C-569/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* [2018], EU:C:2018:871.

[79] ibid, para 80-85.

[80] These assumptions were repeated in many rulings after, like Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu* [2018], EU:C:2018:874, Case C-147/17 *Sindicatul Familia Constanţa and Others v Direcţia Generală de Asistenţă Socială şi Protecţia Copilului Constanţa* [2018], EU:C:2018:926, and Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* [2019], EU:C:2019:43.

in *Bauer*, the Court shifted from its traditional stance and affirmed the articles of the Charter as imperative rules which can be brought in private parties' disputes. What can guarantee this result, is the interaction between the Charter and the pertinent Directive.

Consequently, it would not be an exaggeration to say that the horizontal applicability has unequivocally been included in the fundamental rights establishment, as it is comprehensive enough taking after the Charter. This is quite a useful development, since the 'the 21st century Leviathan is often a beast of a private nature', as it has successfully been said.[81]

The European Union of nowadays is a heavily integrated organization from an economic perspective; however, it is not only this. The social and political reality which accompanies the economic integration require a uniform approach to the various aspects of the citizens' activities. The common denominator of these activities should be the implementation of the fundamental rights. This should penetrate all dimensions of the EU exercise, the economic activity included. That was stressed out in *Bauer,* where the Court emphasized that 'the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law'.[82] The fact that the Court articulated the value the horizontal application has for the first time in a social rights context is another small victory. As clearly indicated in the *Viking* and *Laval* cases, the social security field was a quite afflicted one by the freedoms' preferential implementation. The fact that ECJ explicitly ruled in favor of horizontal application in a dispute between an employer and an employee may be translated as the Court equipping the chorea of social rights with effective legal protection.

3.1[b] Topfit & Biffi: Harmonizing EU's Rights?

However, a direct obligation to protect the fundamental rights was imposed by the Union in a framework much more unexpected than that of employment– the one of athletics. In a ruling deciding on sports, the Court broadened the scope of what was protected under EU law. Differentiating from the traditional interpretations applying until then, the Court said that, subject to EU law, were not only the activities which could be considered economic, but all the obligations resulting from the various provisions of the Treaty.[83] In *Bauer*, the Court added that 'the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law'.[84] This unusual approach led to the conclusion that practicing any sport activity which is subordinate to the law of the Union can be perceived as the tangible realization of the fundamental rights and freedoms enshrined in the Charter by individuals. The Union jumped in the observance of these rights, abolishing the clearly economic nature of an activity if a right was to be protected.

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[81] Wojciech Lewandowski, 'Is Bauer the new Bosman? – The implications of the recent jurisprudence of the Court of Justice of the European Union for FIFA' (2019), Verfassungsblog, <https://verfassungsblog.de/is-bauer-the-new-bosman-the-implications-of-the-recent-jurisprudence-of-the-court-of-justice-of-the-european-union-for-fifa/> accessed 16 December 2020.
[82] *Bauer et al* (n 78) para. 52.
[83] Case C-519/04 *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2006], ECR 2006 I- 06991, para. 28.
[84] *Bauer et al* (n 78) para.52.

The same outcome was noticed in a later judgment also concerning sports, i.e *Topfit and Biffi*.[85] The case was deciding on dual careers of students performing at the same time as athletes. It was a case having consequences linked to the freedom of movement since, according to the Commission, 'athletes represent one of the most internationally mobile parts of the European population'.[86] Under those conditions, it would be impossible to risk the athletes' right to access the sporting events they were interested in on a non-discriminatory basis because of the lack of harmonization of national laws and regulations.[87]

The main implication about this case was, as it is easily understood, the particular nature of the athletes' career: the subjects of EU law in this case, being students and sportsmen at the same time, were exercising a non-economic sporting activity. However, the nature of the activity did not hold the Court back from ruling in favor of the rights' integrity. At that, the Court did not hesitate to go one step further and state that EU law must be interpreted as precluding a national provision relating each time to the case. In this way, the judgment, developing an *erga omnes* binding effect moved to the direction of creating a de facto level of harmonization of Members' States legislation. This is what prominent members of the academy and lawyers meant when they were ascertaining that the decision did its small bit to the direction of integration in the field of rights.

This integration is closely linked to the EU law-making procedure. In the field of sport, just like the one of education, Union has a supporting competence, meaning that it cannot replace the respective competence coming from the Member States, and that legally binding acts of the Union for these areas shall not entail any kind of harmonization of the Members' laws. The bold move from ECJ was that in *Topfit and Biffi* it ruled *contra* to this notion. Despite the sport was regulated in this field, the Court, ignoring Advocate General Tanchev's divergent opinion,[88] proceeded to decide that leisure activities like sports justify for the persons to move freely pursuing their practice of an amateur sport in another Member State.

The decision marked an intersection for the EU case-law, as it brought two innovations: first, it stretched the boundaries of the supporting competences in EU, in order to serve a greater purpose; and second, it brought into the fore the indirect effect of harmonizing the Member States' national legislating through the implementation of a right, the right to leisure and amateur sporting activities. It is really interesting that the Court decided to rule these developments in a decision relating to second-rate sportsmanship of minor importance. The effort is even more surprising if someone thinks that EU's supreme court had previously ignored the same possibility in cases which were of much more significance, like the ones involving social security rights. The fact that *Topfit and Biffi* was about amateurs and not workers stroke many people, questioning the whole priority list the Court mentally sets. Amateur athletics is of course a pastime with remarkable benefits;

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[85] Case C-22/18 *TopFit e.V. and Daniele Biffi v Deutscher Leichtathletikverband e.V.* [2019], EU:C:2019:497.

[86] Commission, EU Guidelines on Dual Careers of Athletes. Recommended Policy Actions in Support of Dual Careers in High-Performance Sport, Approved by the EU Expert Group 'Education & Training in Sport' at its meeting in Poznan on 28 September 2012, <https://ec.europa.eu/assets/eac/sport/library/documents/dual-career-guidelines-final_en.pdf> accessed 16 December 2020.

[87] Stefano Bastianon, 'The *TopFit* judgment on amateur sport and its potential aftermath on the relationship between EU law and dual careers of athletes' (2019) Eurojus, 85.

[88] See Opinion AG Tanchev in Case C-22/18 *TopFit e.V. and Daniele Biffi v Deutscher Leichtathletikverband e.V.* [2019] EU:C:2019:181, para. 99.

however, since it does not put at stake rights of great gravity, like that of fair working conditions or that of social protection, it was surprising that the Court was so zealous about it. Nevertheless, the value of this decision should be highlighted, irrespectively of the motivation behind it. It created much more space for the fundamental rights in EU, and it shook the realm of the 'economicism' in Europe. Its contribution will be greatly appreciated, especially in the face of new challenges ahead.

3.2 A SMILE FROM A VEIL: NON-PRIVACY & ANONYMITY

From the decade of 2000s on, a new destabilizing factor came to be added in the truncated culture of EU in regard with human rights. The zeitgeist of the digital technologies contributes to a blurred image the subjects of the law have nowadays for their position in the society, for the others, even for themselves. Consequently, these technologies have a massive impact on the human rights area, too. They fragment the direct democratization process by intervening in the comprehensive information flow, and they distort possible accountability processes on a continuous basis. An example of this intervention is the dreary events in France during the public transport strikes last year. Three of the country's most active transport syndicates saw their pages to be blocked from Facebook, so their content could not disseminate information either to workers or to the public.[89] The result of this sui generis censorship was that almost 20,000 people were not able to reach the news streaming regarding the employees' mobilization and subsequently not able to form a knowledgeable opinion.[90] But the intervention is not only positive, meaning the ban of freedom of speech and association, but also negative, since in the online environment phenomena like harassment, intrusion of privacy or even violence are quite often nowadays.

The business model sustaining this problematic situation has once been named 'surveillance capitalism'.[91] Because of the large capitalization of the sector, respecting human rights is taken as an externality no one is willing to be charged. The scheme is not effective from a competition standpoint and the tech-giants constantly try to avoid it. It would be premature and inequitable to blame EU that its legal framework nourishes this very model. However, the traditional dipole of 'freedoms or rights' might be considered to facilitate the commodification of personal data;[92] this becomes very evident in the case of the 'big four' of the technology services, i.e. Apple, Facebook, Google and Amazon.

The major players of the field are heavily and systematically involved in commercialization of private information and no adequate remedy can be claimed against them. Uber was about to face fines for keeping data breach secret,[93] just like Facebook after

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[89] Vincent Vérier, 'SNFC: Facebook restraint les comptes des syndicats SUD Rail et CGT cheminots *Le Parisien* (22 October 2019) <https://www.leparisien.fr/economie/sncf-facebook-restreint-les-comptes-des-syndicats-sud-rail-et-cgt-cheminots-22-10-2019-8178201.php> accessed 16 December 2020.

[90] Benjamin Hue, 'Perturbations à la SNFC: Facebook censure-t-il les pages des syndicats de cheminots?' *RTL* (23 October 2019) <https://www.rtl.fr/actu/debats-societe/perturbations-a-la-sncf-facebook-censure-t-il-les-pages-des-syndicats-de-cheminots-7799312041> accessed 16 December 2020.

[91] Shoshana Zuboff, *The Age of Surveillance Capitalism, The Fight for a Human Future at the New Frontier of Power* (BBS Public Affairs Publications, 2019).

[92] See University of Cambridge, 'Human rights in a digital age, Privacy. Democracy. Freedom of speech', <https://www.cam.ac.uk/cammagazine/humanrightsinadigitalage> accessed 11 October 2020.

[93] Peter Teffer, 'Uber may face fines in EU for keeping data breach secret', euobserver.com (22 November 2017) <https://euobserver.com/digital/139975> accessed: 17 October 2020.

a big scandal in 2019, caused by the social media platform's tendency to 'play fast and loose' with its users' privacy. Facebook was found to put its users in online security risk in 2019, as almost 419 million user records (like phone numbers and passwords) were traced down in an unprotected server domain, at risk for serious hacking incidents or potential leakage.[94] Previously the same year, similar Facebook data were found exposed on Amazon servers leading community to think that at this point we may use Facebook at our own risk.[95] The Cambridge Analytica-scandal[96] gave us a strong flavor of what an unlawful use of personal data might be: scary and Orwellian, dangerous to lead even to 'unperson' practices. So, does EU roll its eyes in front of such practices, in the expense of people's individual rights?

The main vehicle for facing such breaches from EU' s part has always been imposing financial sanctions (anti-trust and competition policy fines included). Again, a pro-market consideration takes precedence and becomes the suggested solution for the Union. After the investigation on the social media platforms which took place in 2018 was concluded, Facebook reviewed its Terms and Conditions in order to clearly explain how the company handles its users' data to develop profiling activities and target advertising to finance their company.[97] However, even this reform was not taken as an interference for the human rights standards to be raised; it was seen rather as consumer empowerment, than a human rights stance. As Commissioner Jourová said in her statement*: '*Today Facebook finally shows commitment to more transparency and straight forward language in its terms of use. […] By joining forces, the consumer authorities and the European Commission, stand up for the rights of EU consumers'.[98] The text stresses out the importance of safeguarding clear information and explaining the digital space policies for the consumers' sake, and not for any respect for fundamental rights to be attained. EU' s subjects are economic operators in the integrated market, i.e. consumers directing their purchasing power towards a specific drift, not people needing to safeguard a high level of respect because of their inherent value.

At the end, Commission asked the regional data protection authorities to investigate Facebook's streaming of data to Cambridge Analytica, an investigation which led to the imposition of a tremendous fine to the social networking platform: 1 million euros dictated from the Italian privacy regulator, the biggest levy in connection to the misuse of people's data until that time.[99] The UK's Information Commissioner's Office also hit the company

[94] Davey Winder, 'Unsecured Facebook Databases Leak Data of 419 Million Users', forbes.com (5 September 2019) <https://www.forbes.com/sites/daveywinder/2019/09/05/facebook-security-snafu-exposes-419-million-user-phone-numbers/> accessed: 17 October 2020.
[95] Seth Fiegerman and Donie O'Sullivan, 'Hundreds of millions of Facebook records exposed on Amazon cloud servers', cnn.com (3 April 2019) <https://edition.cnn.com/2019/04/03/tech/facebook-records-exposed-amazon/index.html> last access: 17 October 2020.
[96] Julia Carrie Wong, 'The Cambridge Analytica scandal changed the world – but it didn't change Facebook', theguardian.com (18 March 2019) <https://www.theguardian.com/technology/2019/mar/17/the-cambridge-analytica-scandal-changed-the-world-but-it-didnt-change-facebook> accessed 17 October 2020.
[97] Commission, Facebook changes its terms and clarify its use of data for consumers following discussions with the European Commission and consumer authorities (Press Release, 9 April 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2048> accessed 11 October 2020.
[98] James Cook, 'Facebook bows to EU demands to end 'misleading' use of personal data' The Telegraph (9 April 2019) <https://www.telegraph.co.uk/technology/2019/04/09/facebook-bows-eu-demands-end-misleading-use-personal-data/> accessed 10 October 2020, (emphasis added).
[99] Mark Scott, 'Facebook fined € 1M over Cambridge Analytica scandal', politico.com (28 June 2019) <https://www.politico.eu/article/facebook-fined-cambridge-analytica/> accessed 10 October 2020.

with a huge penalty, implementing European data protection rules.[100] In other words, Commission has chosen to speak to the Big Tech in a language they understand: money. Making money is the utmost purpose of companies using data-hungry mechanisms in a way which builds a very self-serving relationship with the concept of human rights. As information is the 21st century currency, imposing fines to them does not contribute to the solution of the problem in any way: in the opposite, it further pushes forward the monetization of data. Nevertheless, if we accept the perspective that personal data is like a tradeable commodity, then the social aspect of the privacy and its self-development advantages fall apart. It is a model bolstered even since the '70s, through a cynical economic analysis of law. Back then, even without the excessive interconnection of computers and social networking, personal information was appraised as having value to others, and that others would incur costs to discover it.[101] This resulted in ranking privacy and information as intermediate goods, namely instrumental values, driving utterly to financial gain. This notion drives society to a very neoliberal version of human rights,[102] similar to the one developed by the Chicago school of economics: there is a possibility for the people who have fewer resources to sell their personal records, as a lucrative activity, in the environment of an economy which depends on big data more and more.

This is one more example where EU falls short of advocating human rights over economic freedoms. In fact, the Union systematically, thoroughly and easily suspends the rights implementation for the financial growth's sake: it is well-known that tech champs as Google is, yield to Commission great deals of money, even these monies do not come from the expected sources. For the financial year 2018, for instance, the fines paid from Google were escalated up to $5.1 billion, compared to income taxes of just $4.2 billion. In other words, Google paid more money in EU fines than it paid in taxes, but this does not make any difference to the Union. As long as it earns money, the latter will not act to the companies' substantial detriment.

3.2[a] Schrems I & II: Waking Up to Ash and Dust

The ECJ started to expand its oversight into the area of the digital surveillance, starting from the *Digital Rights Ireland*[103] case. There, building upon the Kadi-line of case-law,[104] the Court ruled that if any kind of digital interaction of the citizens is kept for future intelligence reasons and law enforcement purposes, then undesirable lattermaths are plausible in the sphere of

[100] 'ICO issues maximum £500,000 fine to Facebook for failing to protect users' personal information', ico.org.uk (25 October 2018) <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/10/facebook-issued-with-maximum-500-000-fine/> accessed 17 October 2020.
[101] Richard A. Posner, 'The Right of Privacy' (1978) 12 Georgia Law Review, 394.
[102] See Human rights in a digital age (n 92).
[103] Case C-293/12 and C-594/12 *Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [2014], EU:C:2014:238.
[104] Federico Fabbrini, 'Human Rights in the Digital Age. The European Court of Justice Ruling in the Data Retention Case and its Lessons for Privacy and Surveillance in the US' (2015) 28 Harvard Human Rights Journal 22.

individuals' private life.[105] However, the turning point came with the *Maximilian Schrems* case.[106]

In the *Schrems* saga, the Court seemed to come to awareness of the pervasive nature a data collection program could have, invalidating the key mechanism for EU-US data transfers for two times in a row. Maximilian Schrems, an Austrian privacy rights activist filed a complaint with the Irish courts, criticizing the incompatibility of US surveillance programs and existing EU law permitting transfers to the US. Under the EC's Safe Harbor Decision,[107] the US data importers were able to 'self-certify' that they provided essentially equivalent protection to that guaranteed under EU law, including the protection of fundamental rights under the EU Charter. Schrems' complaint was about this very specific provision as, in the light of Edward Snowden disclosures, he thought that these arrangements were not adequate for ensuring private data protection. After the Hight Court of Ireland made a referral to ECJ, the latter took the stance that Safe Harbor did not afford the equivalent level of protection to that provided on an EU level, ending up to its invalidation.[108]

It was a shining example of the Court that it did condemn not only the governmental surveillance as usual, but also an evident misuse of data coming from private operators. Facebook and other similar companies relied on decisions which enabled data transfers if the protection achieved was tantamount to that afforded by EU laws. The invalidation of the Safe Harbor scheme leads to a startling conclusion regarding the status of the freedom of data, as opposed to the four fundamental freedoms of EU law. Unlike the traditional freedoms, the free flow of personal data in EU is not enshrined in the EU treaties, but only in pieces of secondary law, the main of them being the Data Protection Regulation.[109] From a technical standpoint, the online data freedom is subordinated to the other freedoms, lacking a status of primacy.[110] This holds special gravity if someone thinks that its main rival, i.e. the right to privacy and anonymity, has been bestowed the status of primary law, as it is introduced in the Charter of Fundamental Rights, and also protected through a special article in TFEU.[111]

After the invalidation of Safe Harbor, the Irish DP Authority asked Schrems to reformulate its complaint. Schrems acted accordingly, and this time his application was mainly directed against Facebook's data transfers outside EU based on SCCs (Standard Contractual Clauses), the alternative to Safe Harbor. He especially claimed that the protection could not be of the same quality in US, because of the obligation of private companies in the

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[105] In para. 27, the ECJ ruled that '[t]hose data, taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them'.

[106] Case C- 362/14 *Maxillian Schrems* v *Data Protection Commissioner* [2015] EU:C:2015:650, C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maxillian Schrems* [2020] EU:C:2020:559.

[107] Commission Decision 2000/520 of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US [2000] OJ L 215/7.

[108] *Schrems I* (n 106) paras. 98, 104-106.

[109] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119.

[110] Oliver Linden, Eric Dahlberg, 'Data flows – A fifth freedom for the Internal Market?' (2016) National Board of Trade of Sweden 19.

[111] Art. 16(1) TFEU.

States to provide access to personal data to public authorities under US surveillance programs. In essence, he was arguing against the Privacy Shield Framework signed between US and EU.

The *Schrems* decisions were in fact turned against the practice of 'contracting out' data across the Atlantic. The Court ruled with clarity that DPAs should take action against irregular transfers and this induces changes for the usual private companies' activities. As pointed out,[112] what is at stake is the $7.1 trillion economic relationship between EU and US; this has to remain intact. That is why the US government insists supporting that the protection under its national security laws 'meets' and 'exceeds' the safeguards 'in foreign jurisdictions, including Europe'. So, the Commission and the US Department of Commerce have to seek for another solution for EU companies to contract out the protection for human rights in case the public authorities are unwilling to ensure it.

However, *Schrems* cannot be directly linked to the intra-European freedom of trade: it is clearly an interpretation having also exoteric echoes, in relation to EU's federal competitive force, and not a set of standards with exclusively internal influence. *Schrems II* decision was amplifying the scope of the ruling effects not only in transfers of data from EU to USA, but also to all transfers of personal data from EU to countries outside the EEA.[113] In other words, does Europe have double standards, being strict to its antagonists and resilient towards its own democracies?[114] That remains to be seen.

3.2[b] Faster Than a Cannonball: What's Next?

The *Schrems* decision made very obvious that the EU personal data transmission guarantees have universal application. The ruling effectively terminated the privileged access that US companies had over personal information from data pools like Facebook, baptizing EU a prominent defender of the very much needed anonymity. This being said, one can understand that the certain title entails responsibility: if EU likes to see itself as a global standard setting actor,[115] it has to take substantial action, and not to pay mere lip service to the data freedom. The Union has to duly respect the personal information of its subjects, which, in the age of media, form the very core of their personality. This respect lies in the heart of the EU commitment for democracy and fundamental rights. The fact that EU chooses to consistently oppose this right to the freedom of goods or the freedom of capitals, takes down the whole narrative of EU as the champion of the right to privacy.

Furthermore, EU does not seem amenable to start the conversation for the real bitter pills to swallow. It eagerly takes initiatives to discuss topics like the notorious right to be forgotten or the right to object to data processing (the celebrated 'consent question'), but it

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[112] Genna Churches and Monika Zalnieriute, "Contracting Out" Human Rights in International Law: Schrems II and the Fundamental Flaws of U.S. Surveillance Law' (2020) Harvard International Law Journal Online 2.

[113] Cynthia O' Donoghue, Philip Thomas, Sarah O' Brien, Andreas Splittgerber, Christian Leuthner, Elle Todd, 'Schrems II: History repeats itself but it is not all bad news for international data transfers' (2020) Reed Smith, <https://www.reedsmith.com/en/perspectives/2020/07/schrems-ii-history-repeats-itself-but-it-is-not-all-bad-news> accessed 11 October 2020.

[114] Rana Foroohar, 'Europeans have double standards on transatlantic trade' *Financial Times* (20 October 2019) <https://www.ft.com/content/b526c2a2-f191-11e9-bfa4-b25f11f42901>, accessed 11 October 2020.

[115] Stafano Saluzzo, *The EU as a Global Standard Setting Actor: The case of Data Transfers to Third Countries in Use and Misuse of New Technologies* (Springer 2019) 115-134.

does not encourage the public dialogue on hot topics like the ownership regime of the data. This failure clearly demonstrates that EU misses the real question: this is not about individuals, but about collectivity. Brussels bureaucrats insist to centre this debate around the individual and not the community. However, the digital rights are not a private affair. They are the expression of a wider concern, presenting mass characteristics and having collective implications. The digital footprint, for instance, the unique set of the traceable digital activities someone manifests in an online environment, incarnates this exact notion, as it is created, detected and used always in respect to others. It is released by a user for the purpose of sharing information about someone by means of websites or social media, meaning in the course of an interactive process. Being an isolated, self-centered function, this process would not have any worth: it is this impact the information has to the rest of the community that defines its value. It is also the same for the meta-data digital forms: these descriptive elements have grown an impact on one's professional life, private affairs or behavioral traits, because of their statistical and referential relative value.

Seeing the data problem as a phenomenon remote from other social aspects and adopting a kind of neoliberal perception for the civil rights represents a threat for the collective systems the regional organizations like EU have failed to protect. The fact that during recent years civil society has brought landmark data protection challenges in the courts[116] is indicative of a legal void which is quite tangible at the time. Citizens feel that they are left hanging between the tech colossus' interests and the EU's reluctance to harm a significant market, a choice which can be solvent for the democratic nucleus of the Union itself. Ahead of these developments, they decide to take over the reins and start efforts to do justice.

It seems that EU still does not have a plan as to how to move forward. Trapped in a pompous rhetoric regarding its position as the patron of privacy, it denies itself as it tolerates data misuses on its ground, doing nothing but imposing fines. The future will be demanding, and if someone is to respond to it, then it is better to act on the substance, not the form. It is the only way forward, in an era of computers.

4 CONCLUDING REMARKS

What was attempted in the previous pages, was an evaluation of the 'balance of terror' between fundamental rights and freedoms, the two propositions of a long-held dualism in EU. The ongoing evaluation process taking place inside the EU institutions in general puts at stake fundamental rights status continuously. Each time a fundamental freedom is under examination, the rights' status becomes asthenic, as they are seen as an exemption to the rule, not as a comprehensive legal regime. The Court itself seems to affirm this observation. Despite the fact that there were some examples of real balancing work, like *Schmidberger*, the rest of the case-law seems to confirm a sad statistic: in the majority of the cases, freedoms take head over rights in a predetermined course, ending up to evaluate freedoms as too valuable to be sacrificed. *Viking* and *Laval* are characteristic examples of this mentality, even if the importance of their facts was broadly recognized. So, the most the fundamental rights

[116] Except *Digital Rights Ireland* case brought before CJEU, *see* also *Roman Zakharov v Russia (2015) Application no 47143/06* and *10 Human Rights Organisations and Others v. the United Kingdom Application 24960/15*, both before ECtHR, regarding surveillance regimes violating human rights.

will ever have in the EU legal framework is being a self-standing category of exception grounds.

The Court of the Union has evolved to be the undisputable hegemon of the EU establishment: its legacy influences the political and economic choices in a decisive way. Its sophisticated culture promoting legal cosmopolitanism and constitutional pluralism has gone to lengths no other court has gone. But is this a justification for the activist approach it adopts many times, in the detriment of fundamental rights? Even if someone accepts the reality that personal movement rights of EU citizens should be safeguarded against social protectionism or heavy forms of statism, this does not supersede the fact that the Court most of the times leans towards the economic integration on every cost.

The new realities emerging due to the extended use of technology bring along new tendencies in the field of the dilemma 'freedoms or rights'. Members of the civil society and other social factors swing into action, transforming into what EU, in a narcistic way, thinks it has become: a guardian of the fundamental rights. And despite the fact that the Union conducts in a complacent manner regarding the safeguarding of confidentiality of data, as it was the crucial regulator in the field, the latter is not true. EU might waste much energy on the data debate; however, it does not take essential action towards the big companies' scandals and misconducts. It insists seeing financial penalties as the most appropriate response to practices which undermine rights over profit. Its myopic view is not corrected even after realizing that this tactic has no results: the companies pay the fines and then keep falling in failures, putting at risk people's personal lives.

Networking degradation due to the Union's incompetence is of course a development no one wishes for - and most of all, community itself. But this should not entail a subsequent undermining of the rights' fundamental status. If Europe is to understand and overcome the difficulties facing after the advent of a financial crisis, it must deny a privileged position to the freedoms. Only if the two fundamentals enjoy the same status stability, unity and ever-greater harmonization will be attained the upcoming years.

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EU LAW AND THE DISCRETION OF PRIVATE NATIONAL DECISION-MAKERS IN LIGHT OF THE COURT'S JUDGMENT IN CASE C-22/18 *TOPFIT AND BIFFI*

ANGELICA ERICSSON*

This contribution aims to introduce the reader to a judgement from the Court of Justice which seems to broaden the scope of application of EU free movement rules to private regulatory bodies in two ways. One the one hand, this judgment expands our understanding of what type of private regulation can fall within this scope. On the other hand, it shows that EU law requires a private prior authorisation scheme to be infused with the same objectivity safeguards as those that have been required for public ones.

1 EU LAW, NATIONAL ADMINISTRATIVE DISCRETION AND LEGAL AUTONOMY OF PRIVATE ACTORS

The focus of this piece will be the application of EU administrative law principles to certain private decision-makers and how this affects their legal autonomy. When one speaks of the power of private entities to take decisions, this power can generally be described as legal autonomy rather than discretion – conveying the idea that the capacity of private entities, as opposed to public ones, is not inherently limited by law.[1] Before going into the article's main feature, the judgment handed down by the EU's Court of Justice[2] in the *TopFit and Biffi* case,[3] I will start by briefly elaborating on the two EU law themes that are most relevant to the set focus, namely the development of an EU administrative law shield against arbitrary national decision-making and the application of EU Treaty rules to private actors. Later, in sections 3 and 4 of this case note, you will find my analysis of the impact said judgment has had on these themes. The last section will provide some brief final conclusions.

1.1 AN EU ADMINISTRATIVE LAW SHIELD AGAINST ARBITRARY NATIONAL DECISION-MAKING

It follows from the Treaty on the Function of the European Union (TFEU) that Member States should not hinder EU free movements, at least not in an unjustified manner. This, in itself, is a fairly uncontroversial statement. What has been more controversial, and what has

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[1] In contrast, if one accepts that the existence and power of public entities are justified by and through public law, their power to choose between different actions could only ever be described as discretion - never as autonomy.

[2] Henceforth, referred to as 'the Court of Justice' or simply 'the Court'.

[3] Case C-22/18 *TopFit and Biffi* EU:C:2019:497.

consistently generated significant political and academic debate over the years, is the Court's interpretation of what should be qualified as unjustified restrictions of the EU free movements.

In relation to different kinds of national prior authorisation schemes, the Court of Justice has developed an EU administrative law shield against arbitrary national decision-making, including a set of requirements which I have chosen to call 'objectivity safeguards'.[4] In more concrete terms, the Court has developed case-law where it demands that such authorisation schemes – when they can potentially restrict the EU free movements – must be based on *accessible, objective and non-discriminatory criteria which are known in advance* and that the decisions to refuse authorisation must be *reasoned, taken in a timely manner, and subject to effective judicial review*.[5] By their nature, these required objectivity safeguards are closely tied to general principles of administrative law – as found both in EU law and in domestic legal orders – such as the principles of legality, equal treatment, transparency, good administration and access to effective judicial protection. All these principles are designed to maintain the rule of law, by providing safeguards against arbitrary decisions by public entities.

In this article, I would like to highlight that the development of such objectivity safeguards, despite their distinctive 'administrative law flavour', may have constitutional law impacts on national legal orders that reach beyond the traditional realm of administrative law, in the sense that not only the discretion of public, but also private, national decision-makers would be affected. Hence, my analysis will draw attention to the imposition of such uncodified 'administrative law'-type EU requirements on private national decision-makers. It is in this light that I will discuss the Court's judgment from the 13th June 2019 in the *TopFit and Biffi* case.

In section 4 below, it will be specifically considered whether, in light of this judgment, also private actors who put into place a prior authorisation scheme are bound by EU law to infuse it with objectivity safeguards. But first, in sub-section 1.2, the application of EU Treaty rules to private actors will be considered more broadly, as a background to the analysis in sections 3 and 4.

1.2 APPLICATION OF EU FREE MOVEMENT RULES TO PRIVATE ACTORS

Do the EU free movement rules only concern public entities, or do they also prohibit private entities[6] from discriminating on the basis of nationality? Hans Ragnemalm, a former judge at the Court of Justice, once noted that as long as private undertakings do not affect competition, their discriminatory conduct is not normally regarded as being contrary to the

[4] After abandoning the conceptual candidates used previously to describe these requirements in Angelica Ericsson, 'Structural Guarantees - the Union's Last Best Hope against National Arbitrariness' (2010) 13 Europarättslig tidskrift 237 and Angelica Ericsson, 'The Role of the Court in Limiting National Policy-Making : Requiring Safeguards against the Arbitrary Use of Discretion' in Johan Lindholm and Mattias Derlén (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives* (Hart Publishing 2018).
[5] See eg Case 304/84 *Muller* EU:C:1986:194, Case 178/84 *Commission v Germany (German Beer)* EU:C:1987:126 and Case C-672/15 *Noria Distributions* EU:C:2017:310, as well as Sacha Prechal, 'Free Movement and Procedural Requirements: Proportionality Reconsidered' (2008) Legal Issues of Economic Integration 201.
[6] Understood as natural and legal persons.

Treaty rules on free movement.[7] In particular, he argued that even if early case-law pointed into the other direction, the Court of Justice seems to have settled on the premise that EU rules on the free movement of goods only concern acts of public authorities and not acts of private undertakings.[8] However, if private actors would effectively manage to disturb trade in goods, the Court has made clear that the Member States – due to their duty of loyal cooperation – are judicially accountable if they don't take action to prevent such disturbances.[9]

Moreover, we can deduce from the Court's case-law that some entities constituted under private law might still carry the same responsibilities as public authorities, for the purposes of the legal obligations laid down in directives, even if such legal acts can normally not be relied upon against private entities. In fact, building on its own statements in the *Foster* case,[10] the Court of Justice has declared that

> 'a body or an organisation, even one governed by private law, to which a Member State has delegated the performance of a task in the public interest and which possesses for that purpose special powers beyond those which result from the normal rules applicable to relations between individuals is one against which the provisions of a directive that have direct effect may be relied upon'.[11]

Also in relation to directives, Azoulai has discussed how the Court can use a constitutional principle, if it is the 'superior expression' of the specific provisions of the non-applicable directive, to create rights and obligations that the national court has the obligation to protect in any private litigation.[12] This technique, which is rooted in the famous *Defrenne* case,[13] has resurfaced in other disputes against private employers, such as the cases *Kücükdeveci*[14] and *Egenberger*.[15]

Shifting our focus back to the application of the Treaty rules on free movement, the foundations for the invocability of the free movement of workers and the freedom of establishment against private entities are to be found in the *Walrave and Koch* case.[16] In its judgment in this case, the Court of Justice used a pragmatic approach to assure effectiveness of EU law. It held that the prohibition against discrimination on the basis of nationality does not only apply to the action of public authorities but also extends to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services,

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[7] Hans Ragnemalm, 'Fundamental Freedoms and Private Action: A New Horizon for EU Citizens?' in Hans Ragnemalm and Mats Melin, *EG-Domstolen Inifrån : Uppsatser Om Och Kring Rättskipningen Inom EU* (Jure 2006) 183.

[8] Hans Ragnemalm, 'Fundamental Freedoms and Private Action: A New Horizon for EU Citizens?' (n 7), 183f and K.J.M. Mortelmans, 'The Functioning of the Internal Market: The Freedoms' in PJG Kapteyn (ed), *The Law of the European Union and the European Communities: With Reference to Changes to Be Made by the Lisbon Treaty* (4th rev. edn, Kluwer 2008) 636.

[9] See Case C-265/95 *Commission v France (French farmers)* EU:C:1997:595 and Case C-112/00 *Schmidberger* EU:C:2003:333.

[10] Case C-188/89 *Foster and Others* EU:C:1990:313.

[11] Case C-413/15 *Farrell* EU:C:2017:745, para 35.

[12] Loïc Azoulai, 'The Case of Fundamental Rights: a State of Ambivalence' in Hans-W Micklitz and Bruno De Witte, *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 215.

[13] Case 43/75 *Defrenne* EU:C:1976:56.

[14] Case C-555/07 *Kücükdeveci* EU:C:2010:21.

[15] Case C-414/16 *Egenberger* EU:C:2018:257.

[16] Case 36/74 *Walrave and Koch* EU:C:1974:140.

since the abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organisations which do not come under public law.[17] This formula was later reiterated by the Court in the *Bosman* case[18] and the *Laval* case.[19] What can be clearly concluded from this case-law is that a group or organisation that can exercise a certain power over private individuals, and is able to impose conditions as a result of which the exercise of EU fundamental freedoms may be hindered, can be held accountable against the Treaty rules concerning those freedoms.[20]

Furthermore, cases like *Angonese*[21] and *Raccanelli*[22] suggest that also a private entity which is not a collective regulatory body, like a sports association or a trade union, can be held accountable against the fundamental freedom of workers. Timmermans has argued that the reasoning of the Court of Justice in the *Ferlini* case[23] suggests that the Court will, however, be more reluctant to admit such horizontal effect to the fall-back prohibition against discrimination on the basis of nationality, found in Article 18 TFEU, than to the free movement of workers.[24] On the other hand, the Court recently avoided the chance to expressly refute that Article 18 TFEU would be capable of producing independent horizontal direct effect in the *TÜV Rheinland* case,[25] meaning that the last word is not said on the issue.

2 GETTING ACQUAINTED WITH THE TOPFIT AND BIFFI CASE

The *TopFit and Biffi* case might have passed under the radar for many EU law scholars, at least if they are not specialised in sports law, given that it was not judged by the Court's Grand Chamber. However, I would suggest that this case is well worth getting acquainted with, if one is interested in the themes outlined above.

2.1 THE FACTS OF THE CASE

The *TopFit and Biffi* case originated in a German civil law dispute between private parties, concerning the possibility for an Italian amateur sprinter, Mr. Biffi, to compete in German championships. Although retaining his Italian nationality, Mr. Biffi can certainly be considered to have settled in Germany, where he not only works but also lives with his family. He has been a resident there since 2003 and besides competing in track and field running races, he runs a business in which he provides services as an athletics coach and personal trainer.

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[17] Case 36/74 *Walrave and Koch* EU:C:1974:140, paras 17 and 18.
[18] Case C-415/93 *Bosman* EU:C:1995:463.
[19] Case C-341/05 *Laval* EU:C:2007:809.
[20] P.J.G. Kepteyn, 'The Application and Enforcement of Community Law in the National Legal Systems' in Kapteyn (n 8) 532f.
[21] Case C-281/98 *Angonese* EU:C:2000:296.
[22] Case C-94/07 *Raccanelli* EU:C:2008:425.
[23] Case C-411/98 *Ferlini* EU:C:2000:530.
[24] C.W.A. Timmermans, 'The Basic Principles' in Kapteyn (n 8) 163.
[25] Case C-581/18 *TÜV Rheinland LGA Products and Allianz IARD* EU:C:2020:453.

Together with the Berlin-based athletics club Topfit which he was a member of, Mr. Biffi had challenged the application of new rules governing the right to participate in national athletics championships. These rules were adopted and applied by the DLV, the federal umbrella association for German athletics associations, which organises these championships.

According to the DLV's former rules, Mr. Biffi could – and did – participate in the senior category of the national athletics championships. Quite successfully, too. However, according to the DLV's new rules, his continued participation in these championships could only ever be partial, if not barred completely. In fact, henceforth, he could either be refused to participate altogether, based on his nationality, or be allowed to participate but without classification or access to the final. In other words, even if he would be authorised to compete in a national championship, his achievement would not be part of the competition's resulting ranking.

The DLV justified its new rules by claiming that only an athlete of German nationality who can participate in international championships under the abbreviation 'GER', which refers to the word 'Germany', should be the German champion. Furthermore, the DLV claimed that it would be impossible to have rules for senior sport that diverge from those applicable to other age categories. In any event, according to the DLV, since Mr. Biffi's participation in athletics championships would not constitute an economic activity, this participation – and any rules restricting it – would fall outside the scope of EU law.

The Local Court of Darmstadt – responsible for dealing with the dispute between Mr. Biffi, his club and the DLV – agreed that he, despite his impressive sporting achievements, remains an amateur sportsman who is not exercising an economic activity when he participates in championships. However, this national court was unsure whether the application of EU law in the area of sport is always subject to the exercise of an economic activity. In that regard, it observed that, after the entering into force of the Lisbon Treaty, EU law explicitly refers to sport in Article 165 TFEU and that the right of EU citizens to reside in another Member State without discrimination, in accordance with Articles 18, 20 and 21 TFEU, is not dependent on the exercise of an economic activity. Hence, by way of reference for a preliminary ruling, this court asked the Court of Justice if these Treaty provisions should be interpreted in the sense that the DLV's new rules should be considered as unlawful discrimination, contrary to EU law.

2.2 ADVOCATE GENERAL TANCHEV'S OPINION

Although the referring court had apprehended the dispute before it as one primarily concerned with EU citizenship and its relationship with both the prohibition on discrimination on the basis of nationality and the promotion of European sporting issues, Advocate General Tanchev made a different assessment. In his Opinion, he instead claimed that what was at issue in this dispute was a restriction, founded on discrimination based on nationality, of Mr. Biffi's freedom of establishment under Article 49 TFEU.[26]

To justify this reassessment of the dispute, the Advocate General highlighted several factual elements that had emerged at the hearing before the Court, specifically that Mr. Biffi

[26] Case C-22/18 *TopFit and Biffi* EU:C:2019:181, Opinion of AG Tanchev, para 48.

earns his living via sports training and that the title of national champion for Germany would be a valuable and important addition to Mr. Biffi's business card, in the exercise of his economic activity. In the light of these elements, the argument put forward is that Mr. Biffi cannot be regarded as an 'amateur' sportsman, even if he competes in 'amateur' championships.[27]

The Advocate General came to the conclusion[28] that, principally due to the absence of a transitional rule to account for the established rights of EU citizens like Mr. Biffi, who have already acquired the right to compete on an equal footing with nationals of their host Member State, after having exercised their rights to 'move and reside freely' there, the DLV has acted inconsistently with Mr. Biffi's rights to freedom of movement under EU law, and more specifically his freedom of establishment under Article 49 TFEU. He further concluded that the restriction imposed by the DLV is, in these circumstances, disproportionate.

These conclusions primarily relied on an indirect impact of the DLV's new rules on the economic activities of Mr. Biffi[29] and the general principle of respect for acquired rights – which would justify a departure, in this particular case, from a general deference to national margin of discretion in regards to rules of purely sporting interest.[30] Hence, the Advocate General essentially proposed a solution where the Court of Justice could assure that Mr. Biffi and his athletics club would win their pending case before the local court, while generally preserving the status quo of national divergences in sporting rules and avoiding to take the 'significant constitutional step' of giving Article 21 TFEU horizontal applicability.[31]

2.3 FINDINGS OF THE COURT

The Court, however, seems to have been more comfortable with taking that constitutional step than with deciding the case with reference to Article 49 TFEU, as proposed by Advocate General Tanchev, as this Treaty provision had not been debated between the parties to the case.[32]

It was found that, having exercised his right to free movement within the meaning of Article 21 TFEU, Article 18 TFEU is applicable to someone, like Mr. Biffi, who resides in a Member State other than the Member State of which he is a national and in which he intends to participate in sporting competitions in an amateur capacity.[33] In this regard, the Court explicitly mentioned the *access to leisure activities* available in the host Member State – in particular sports, considered to be an important factor for integration – *being a corollary to freedom of movement*.[34]

Further down in the judgment, the Court recognized that it has consistently excluded certain types of sports-related discriminations based on nationality from the scope of the EU free movement rules, such as the time-honoured practices of pinning national sports teams against each other. However, it recalled that such a restriction on the scope of these rules

[27] Case C-22/18 *TopFit and Biffi* EU:C:2019:181, Opinion of AG Tanchev, paras 50 and 51.
[28] As expressed at para 5 of his Opinion (n 26).
[29] Case C-22/18 *TopFit and Biffi* EU:C:2019:181, Opinion of AG Tanchev, paras 62 and 73.
[30] ibid, paras 77, 80, 81 and 87.
[31] ibid, para 56.
[32] Case C-22/18 *TopFit and Biffi* EU:C:2019:497, para 24.
[33] ibid, paras 27-30, and 35.
[34] ibid, paras 31-34.

must remain limited to its proper objective and cannot be relied upon to exclude entire sporting activities from the scope of the Treaty.[35]

As for the abovementioned horizontal applicability of Articles 18 and 21 TFEU, the Court went on to examine the question whether the rules of national sports associations are subject to the rules of the Treaty in the same way as rules emanating from the state are.[36] In that regard, it recalled that, in accordance with settled case-law, observance of the fundamental freedoms and the prohibition of discrimination on the basis of nationality also apply to rules which are not public in nature but which are aimed at regulating gainful employment and the provision of services in a collective manner, since the abolition as between Member States of obstacles to the freedom of movement for persons and to the freedom to provide services, which is a fundamental objective of the European Union, would be compromised if the abolition of barriers emanating from the state could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations which do not come under public law.[37]

The Court then added that the principle established by this case-law, which specifically concerned rules restricting *economic* activity, also applies in cases where a group or organisation exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the EU fundamental freedoms.[38] From this statement, the conclusion was drawn that the rules of a non-public organisation such as the national sports association, which govern the access of EU citizens to sports competitions, are subject to the rules of the Treaty, in particular Articles 18 and 21 TFEU.[39] Already at this point of the Court's reasoning, it became clear that the Court would not be willing to accept the DLV's argument that, as a sports association, it is autonomous and free to establish its own rules.[40]

The DLV's new rules were effectively deemed to constitute a discriminatory authorisation scheme for national athletics championships, which would in itself constitute a restriction to the free movement of EU citizens.[41] Furthermore, given that, even if foreign athletes who are nationals of other Member States would be authorised to compete, they would still be excluded from the official competition rankings, these rules were deemed to have far-reaching effects on the integration of these athletes – not only into the sports club to which they are affiliated but also into the society of the Member State in which they are residing. According to the Court, this negative effect on integration also constitutes a restriction on the freedom of movement of EU citizens within the meaning of Article 21 TFEU.[42]

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[35] ibid, para 49.
[36] It is clear from the context and the French original wording of paragraph 36 of the judgment should be read in this way, even though the English version of this paragraph reads as follows: 'Nevertheless, the question arises whether the rules of national sports associations are subject to the rules of the Treaty in the same way as they are subject to the rules of the State of origin.'
[37] Case C-22/18 *TopFit and Biffi* EU:C:2019:497, paras 37 and 38, recasting the classic wording in paragraphs 17 and 18 of Case 36/74 *Walrave and Koch* EU:C:1974:140, discussed in section 1.2 above.
[38] Case C-22/18 *TopFit and Biffi* EU:C:2019:497, paras 37 and 39.
[39] ibid, para 40.
[40] This argument was explicitly binned at paragraphs 52 and 53 of the judgment.
[41] Case C-22/18 *TopFit and Biffi* EU:C:2019:497, paras 43 and 44.
[42] ibid, paras 45-47.

As for possible justifications for such restrictions on the freedom of movement of EU citizens, the Court proclaimed that,

> as has been held with regard to the composition of national teams, it appears to be legitimate to limit the award of the title of national champion in a particular sporting discipline to a national of the relevant Member State and consider that nationality requirement to be a characteristic of the title of national champion itself.[43]

However, the argument that the public expects that the national champion of a country will have the nationality of that country does not systematically justify *any* restriction on the participation of non-nationals in the national championships, only the ones which are based on objective considerations and respect the principle of proportionality.[44]

When examining the two specific justifications put forward by the DLV, none of them appeared to be founded on the necessary objective considerations, primarily due to the fact that the DLV's mechanism for the selection of which athletes would represent Germany at an international level did not apply to the amateur categories.[45] However, after firmly rejecting these justifications, the Court still left the door open for the national court to consider whether there might be others that could justify the rules establishing the 'admission-under-limiting-conditions' of non-nationals to the national championships. It also gave some concrete guidance on which elements, connected to the specific characteristics of the case at hand, to take into account for the proportionality assessment of such rules.[46]

Up until this point in the judgment, the Court had considered the restrictive conditions under which Mr. Biffi would be allowed to compete, if he was allowed to compete – ie the conditions that thwarted his hopes of taking a medal in a national championship or being officially ranked one of the fastest short-distance runners in Germany, even if he would get to enter the competition. But in the judgment's final couple of paragraphs, the Court turns its attention to the possibility of Mr. Biffi not being allowed to enter the national championships at all.

In this regard, the Court notes that since the participation of non-nationals is subject to an authorisation according to the DLV's new rules, such exclusion would remain possible. Citing only the judgment in the *Analir* case,[47] the Court alludes to a long-standing pillar of EU administrative law for Member States,[48] namely that, in order for a national prior authorisation scheme to be justified in the light of the free movement rules, it must, in any event, 'be based on objective and non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the [decision-maker's] discretion so that it is not used arbitrarily'.[49] The Court then directly moves on to declare that, since there is a mechanism for the participation of a non-national athlete in the German national championships at hand, the total non-admission of such an athlete to those championships

[43] Case C-22/18 *TopFit and Biffi* EU:C:2019:497, para 50.
[44] ibid, paras 48 and 54.
[45] ibid, paras 55-58.
[46] ibid, paras 59-63.
[47] Case C-205/99 *Analir and Others* EU:C:2001:107.
[48] Namely the objectivity safeguards of the EU administrative law shield against arbitrary national decision-making that were presented in section 1.1 above.
[49] Case C-22/18 *TopFit and Biffi* EU:C:2019:497, para 65.

on account of his nationality seems, in any event, to be disproportionate.[50] These two paragraphs of the judgment, paragraphs 65 and 66, do not seem to have caught the interest of other scholars.[51] They will, however, be more extensively analysed in section 4 of this case note.

The drafting of the answer subsequently given to the referring court in the *TopFit and Biffi* case is strikingly specific to the factual situation at hand. This might be a tactic from the Court to keep the possibility to back-track on its development of the case-law by distinguishing the judgment in this case on the basis of its particular facts. Looking solely at the answer given in the operative part of the Court's judgment, one gets the impression that the specific type of sport, the age category of the competitions or the length of the stay of Mr. Biffi in Germany plays a decisive role in the Court's conclusion that Articles 18, 21 and 165 TFEU, in principle, would preclude the DLV's new rules. However, in light of the rest of the judgment, I would rather argue that these parameters would find their relevance in the potential proportionality assessment that was expressly left to the referring court in this case. Moreover, the operative part of the judgment does not reflect the Court's clear and unconditional disqualification of the possibility to exclude foreign athletes, under the authorisation scheme at hand.

3 PRIVATE DECISION-MAKERS' RESPONSIBILITY FOR INTEGRATION WITHIN THE EU

The *TopFit and Biffi* case continues a longstanding tradition of cases relating to sports that pushes the boundaries of EU law-responsibilities that are put on private decision-makers without the enactment of secondary legislation. From the very beginning,[52] is has been rules regulating sports activities that have laid the ground for private law entities being held accountable under EU free movement law. There is, hence, a well-established case-law providing that the prohibition on nationality-based discrimination coupled with the economic free movement rules, such as the free movement of workers and the freedom of establishment, which are mandatory in nature, must be taken into account by the national court in judging the validity or the effects of any national provision limiting those rules, also those provisions inserted in the rules of a private sporting organisation.[53] Already before *Bosman*, but maybe particularly with this widely known case, sports federations 'have definitely and irrevocably lost their aura of immunity under EU law'.[54] Notably, it follows from the judgment in this case that the principle of subsidiarity cannot lead to a situation in which the freedom of private associations to adopt sporting rules restricts the exercise of rights conferred on individuals by the Treaty.[55]

[50] ibid, para 66.
[51] See eg Richard Parrish and Johan Lindholm, 'Horizontal Direct Effect of Union Citizenship and the Evolving Sporting Exception: TopFit' (2020) Common Market Law Review 1283.
[52] With Case 36/74 *Walrave and Koch* EU:C:1974:140, discussed in section 1.2 above.
[53] Case 13/76 *Donà* EU:C:1976:115, paras 11, 17 and 18.
[54] Stefaan Van den Bogaert, 'Bosman: One for All …' (2015) 22 Maastricht Journal of European and Comparative Law 174, 175f.
[55] Case C-415/93 *Bosman* EU:C:1995:463, para 81.

However, up until it judgment in the *TopFit and Biffi* case, the Court had consistently held that sport is subject to EU law 'only in so far as it constitutes an economic activity'.[56] As noted by Parrish and Lindholm, this stance had given rise to a well-founded impression that invoking EU law in a sporting context requires some modicum of economic nexus and that 'EU law cannot be invoked in "pure" amateur sport'.[57] The order for reference from the German court in the *TopFit and Biffi* case questioned this impression and presented competing views on the relevance of economic activity as a prerequisite for the application of EU law, especially after the Lisbon Treaty had entered into force. But even if the DLV and the referring court both seemed preoccupied with the notion of 'economic activity',[58] the Court does not mention this notion explicitly anywhere in its own reasoning. Instead of concentrating on a possible nexus with gainful employment or remunerated services – as Advocate General Tanchev did in his Opinion – or on a possible normative change brought about by the new Treaty framework, the Court of Justice essentially builds its judgment on an overarching (or at least corollary) right to integrate and on the important role of sports for such integration.[59]

This reasoning represents a significant shift in the responsibilities put on sports organisations, due to the EU free movements rules. It is a clear step away from the prevailing view that these organisations would only be bound to justify their rules concerning sport when these rules could hinder someone in their 'professional' exercise of sports. Instead, they would now be bound to justify also rules that are likely to make amateur sport less attractive for EU citizens.[60]

This shift can of course come to affect other areas than sports in the future. One could imagine that also other private organisations regulating the access to certain recreational activities – such as the Scouts, board games associations or social media platforms – would get new responsibilities under this logic.

4 OBJECTIVITY SAFEGUARDS ALSO FOR 'PRIVATE' PRIOR AUTHORISATION SCHEMES

This section is devoted to a specific strand of new potential obligations for private decision-makers, flowing from the Court's judgment in the *TopFit and Biffi* case, namely parts of the objectivity safeguards mentioned in section 1.1 of this article. In accordance with this judgment, they would not only be relevant when a domestic public administration establishes a prior authorisation scheme, but also when a private regulator establishes one.

The relationship between national sports organisations and the public authorities varies greatly between the different Member States,[61] but many of these organisations are established under private law, like the DLV. However, even if the national sports federations are not public authorities, they often enjoy a certain monopolistic position when it comes to

[56] Case 36/74 *Walrave and Koch* EU:C:1974:140, para 4, Case 13/76 *Donà* EU:C:1976:115, para 12, and Case C-415/93 *Bosman* EU:C:1995:463, para 73.
[57] Parrish and Lindholm (n 51) 1284.
[58] Case C-22/18 *TopFit and Biffi* EU:C:2019:497, paras 18 and 19.
[59] See, in particular, Case C-22/18 *TopFit and Biffi* EU:C:2019:497, paras 31-33 and 63.
[60] ibid, para 47.
[61] See Joined cases C-155/19 and C-156/19 *FIGC and Consorzio Ge.Se.Av.* ECLI:EU:C:2020:775, Opinion of AG Campos Sanchez-Bordona, paras 27-29.

organising national championships and, in that position, can regulate the access to such championships. There are no EU harmonized rules regarding such access and Advocate General Tanchev noted the diversity of rules concerning the access to national championships and official rankings within the EU.[62] One form of regulating access to championships or other sports activities could be through a prior authorisation scheme, like the one put into place by the DLV. Pursuant to the rules of this organisation, participation without classification in championships was subject to the approval of the president of the federal committee or the organiser of the event.

As can be understood from paragraph 64 of the judgment in the *TopFit and Biffi* case, the mere possibility of a refusal, which is inherent to the very nature of a prior authorisation scheme, is enough to qualify the scheme as a restriction on the fundamental freedoms of EU citizens. This is consistent with how national prior authorisation schemes have been treated by the Court of Justice in earlier case-law. In fact, even in cases where the authorisation have been claimed to be no more than a formality, practically all applications being accepted, the Court has recalled that the EU free movement is a 'right whose enjoyment may not be dependent upon a discretionary power or on a concession granted by the national authorities'.[63]

As for the imposition of objectivity safeguards as limits to the legal autonomy of the DLV, it follows from paragraph 65 of the judgment that, such a prior authorisation scheme can, 'in any event', only be justified in the light of Articles 18 and 21 TFEU if it is 'based on objective and non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the DLV's discretion so that it is not used arbitrarily'. What was initially conceived of as autonomy, hence, start to look like discretion. As authority, the Court refers to paragraph 38 of its judgment in the *Analir* case.[64] For the purposes of the current article, suffice it to say that the Court appears to make quite a normative leap here. Contrary to the *TopFit and Biffi* case, the *Analir* case concerned a 'prior administrative authorisation scheme', handled by a national public authority, and the interpretation of a piece of secondary EU legislation applying the principle of freedom to provide services. However, this case has, with time, become somewhat of a 'reference of choice' for the Court when it wishes to indicate the need for objectivity safeguards in national prior authorisation schemes.[65]

The Court does not give any specific reasons regarding why the autonomy of a private sports organisation should be limited through the same kind of objectivity safeguards as the discretion of a national public administrative body. However, paragraphs 37 to 39 of its judgment provide the reasoning for why the rules of national sports organisations should be subject to the rules of the Treaty in the same way as public regulations would. Making reference to ample case-law, the Court essentially stated that the freedom of movement for persons and the freedom to provide services would be compromised if the abolition of barriers created directly by the Member States could be neutralised by obstacles resulting from the exercise of the legal autonomy of associations or organisations which are not governed by public law. In this regard, the Court stressed that this principle also applies in

[62] Case C-22/18 *TopFit and Biffi* EU:C:2019:181, Opinion of AG Tanchev, paras 44-47.
[63] Case 130/80 *Kelderman* EU:C:1981:49, para 14 and Case 124/81 *Commission* v *United Kingdom (UHT milk)* EU:C:1983:30, para 10.
[64] Case C-205/99 *Analir and Others* EU:C:2001:107.
[65] See eg Case C-203/08 *Sporting Exchange* EU:C:2010:307, para 50.

'cases where a group or organisation exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty'. It can be concluded that this type of reasoning is squarely positioning the effective enforcement of EU law[66] as the primary (or at least the only available) justification for obliging private decision-makers to infuse their authorisation schemes with objectivity safeguards.

In any event, the Court certainly does not seem to be tied down to doctrinal separations between administrative and private law,[67] as it takes a pragmatic effects-based approach to what can constitute a restriction on EU free movements and what safeguards are needed to prevent unjustified restrictions. Requiring objectivity safeguards also for private authorisation schemes surely makes sense when the private decision-maker has a monopolistic position and can one-sidedly regulate the rights and freedoms of many actors, since the decisions taken by such an actor would formally be horizontal in nature, but present a vertical unevenness.[68] In such circumstances, the private regulator needs to be subject to the same EU checks and balances as the public one.[69] In a similar vein, Timmermans has previously argued for a normative development where the greater the dominant position of the individual or collectively discriminating party or parties, and thus the fewer the alternatives open to the victim of the discrimination, the more likely a finding of discrimination (as sanctioned by EU primary law) would result.[70]

On the topic of normative developments, one could also note that the questions arising in the *TopFit and Biffi* case did not arise in a national doctrinal void. On the 11th April 2018 – before the Court's judgment in *TopFit and Biffi* but after the referring national court in this case had made its request for a preliminary ruling – the German constitutional court handed down a judgment[71] that also related to private sports organisations and the horizontal effects of fundamental rights, more specifically the right to equal treatment. As a sign of (at least apparent) parallel constitutional developments in the laws of the EU and the Member States, this judgement also imposed uncodified 'administrative law'-type requirements on private law subjects such as sports organisations.

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[66] Parrish and Lindholm (n 51) 1291.

[67] Cf. Jürgen Basedow, 'The Judge's Role in European Integration - The Court of Justice and Its Critics' in Micklitz and Witte (n 12) 79: 'While the Court's critics focus on a transgression of Community competences by the Court, the demarcation of Community and Member State competences is an insufficient and inappropriate yardstick for the Court's practice in many areas of law. In private law in particular the reasonable balancing of the interests of the parties involved is more important. But it appears that the Court is not yet fully aware of the difference in approach that is needed for the various areas of law.'

[68] See Wojciech Lewandowski, 'The Implications of the Recent Jurisprudence of the Court of Justice of the European Union for the Protection of the Fundamental Rights of Athletes and the Regulatory Autonomy of Sporting Federations' (2020) 25 Tilburg Law Review 55.

[69] Antoine Duval, 'Guest Editor's Introduction' (2015) 22 Maastricht Journal of European and Comparative Law 172.

[70] C.W.A. Timmermans, 'The Basic Principles' in Kapteyn (n 8) 163

[71] 1 BVerfG, Order of the First Senate of 11 April 2018 - 1 BvR 3080/09 -, concerning so called 'stadium bans'. An English version of the judgment is accessible at the following address: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/04/rs20180411_1bvr308009en.html> accessed 17 December 2020

5 CONCLUSIONS

The judgment in the *TopFit and Biffi* case combines the case-law concerning the right of EU citizens not just to move freely, but to integrate – effectively and without facing disproportionate restrictions – in the Member State they happen to settle down in, with a case-law on horizontal direct effect of the free movement provisions connected to economic activity, and hitherto only applied to private employers or organisations that would regulate the access to the economic activity. As Tanchev's conclusions seem to suggest, this can be regarded as a constitutional quantum leap. It certainly solidifies the EU citizen's right to integrate in her new 'home away from home', when choosing to move from one Member State to another, in the sense that not only the public authorities of her new home – but also certain private decision-makers – will be obliged to provide regulatory frameworks infused with objectivity safeguards. Neither public discretion nor legal autonomy of private regulators may be used to arbitrarily hinder her integration in her new home.

As the title of this article suggests, I would argue that – in light of the *Topfit and Biffi* case – it would be more appropriate to conceptualize the legal autonomy of private decision-makers as a regulatory discretion that is subject to EU administrative law requirements, as soon as this decision-maker is powerful enough to hinder the EU free movements.

One should, however, be aware of problems that might arise when subordinating the relations traditionally governed by private law and based on party autonomy to some obligation of justification. As noted by Azoulaï, this is potentially disturbing for the social policy of the state but also for the structural features of the national system of private law.[72]

[72] Loïc Azoulai, 'The Case of Fundamental Rights: a State of Ambivalence' in Micklitz and Witte (n 12) 215.

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REFLECTION NOTE: EU DATA PROTECTION RULES AND THE LACK OF COMPLIANCE IN SWEDEN

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1 INTRODUCTION

Imagine that your private information is available online: your house address, your date of birth, how many square meters you live on, if you rent your house, your civil status, what car you drive and what people vote in your neighborhood. The list is long. It is not voluntary Facebook. It is Sweden, and is without prior consent of the individual. Sweden claims that the General Data Protection Regulation (GDPR) is not applicable to companies if they buy a publishing license, so-called 'utgivarbevis'.[1] Anyone who pays that license is exempted from the GDPR, the argument goes, because it gives them the freedom of expression and the right to publish, also supported by the Swedish transparency rules.[2] Largely absent from this claimed derogation from the GDPR, however, is the question as to whether the Swedish exception breaches primary EU law on data protection (Article 16 TFEU and Article 8 EU Charter), as well whether the exception from the GDPR is proportionate. A private person or company, can pay the state to get a license without much scrutiny and it gives them a carte blanche to share information about individuals.[3] In addition, these private actors who buy those licenses can earn a profit from advertisement when publishing information about individuals and in certain cases they even sell the information.[4] This seems not to be about freedom of expression, but rather about conducting business. Likewise, if the argument is one of general concern for freedom of expression there is something important missing here, namely a proportionality assessment.

In this short reflection paper, I will set out to explain how and why Sweden breaches EU data protection rules. I will start by providing a brief overview of the EU data protection framework to paint the background picture. Thereafter I will discuss the scope for derogating from the obligations set out in the GDPR and thereby test the Swedish exception and show that it is not proportionate and undermines the purpose of the GDPR. Subsequently, I will discuss why some core fundamental rights of EU law should not be possible to derogate from, when as in the Swedish case it seems to boil down to economic question of who gets to own the data. I will conclude by linking the question of the right to data protection and

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[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ L 119, 4.5.2016, p. 1–88 .

[2] http://www.mprt.se/sv/att-sanda/internetpublicering/utgivningsbevis/

[3] Ibid, it costs 2000 Swedish kr for a licence.

[4] See *eg.* Mr Koll website https://mrkoll.se/ . The website received a fine in 2019 by the national data protection authority for publishing credit information about individuals, but not for publishing other private information. https://www.datainspektionen.se/nyheter/2019/sanktionsavgift-pa-35-000-euro-mot-sajten-mrkoll/.

why licenses should not give companies a carte blanche to publish personal data about people in Sweden to the question of market access. There is an imbalanced relationship here, to use the internal market vocabulary, with Swedish people having all their private data published online while other EU states do not do that. Likewise, there is an external dimension here: the data is available on the internet globally and therefore third countries also access it.

2 THE DATA PROTECTION FRAMEWORK IN THE EU – SETTING THE SCENE

What is EU data protection? In EU law, data protection is formulated as a right. Consequently, the right to data protection is codified in Article 16 TFEU and in Article 8 EU Charter. In addition, Article 7 EU Charter stipulates the right to privacy, communication and family life, and Article 8 ECHR also sets a general right to privacy, communication, home and family life. With Article 16 TFEU, Articles 7 and 8 of the EU Charter, and Article 8 ECHR stating the general right to data protection and privacy. Considering the consequences in the area of law enforcement and the use of, for example, digital evidence, it is arguable that data protection also has the status of a general principle of EU law.[5] Recent case law and scholarship suggests that this is the case.[6]

EU data protection is a hot topic at the moment, and with a dynamic case law taking shape. In several cases the CJEU has asserted the right to data protection, as constituting an EU fundamental right. In *Digital Rights*, the Court annulled the 2006 Data Retention Directive, which was aimed at fighting crime and terrorism, and which allowed data to be stored for up to two years.[7] It concluded that the measure breached proportionality on the grounds that the Directive had too sweeping a generality and therefore violated, inter alia, the basic right of data protection as set out in Article 8 of the Charter. The Court pointed out that access by the competent national authorities to the retained data was not made dependent on a prior review carried out by a court or by an independent administrative body whose decision sought to limit access to the data to what was strictly necessary for the purpose of attaining the objective pursued. Nor did it lay down a specific obligation on Member States designed to establish such limits. The EU legislator had provided an insufficient justification – it was simply not good enough from the perspective of EU fundamental rights protection. The approach was confirmed in *Schrems I* [8] where the Court held that:

> [L]egislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter.

[5] See *eg.* the contributions in Katja Zeigler, Violeta Moreno-Lax and Päivi Neuvonen (eds), *Handbook on EU General Principles*, (Edward Elgar 2021) forthcoming.
[6] See *eg.* the recent Ulf Bernitz, Sylbe De Vries, Xavier Groussot, Jaan Paju (eds) *General Principles of EU Law and the EU Digital Order* (Kluwer law 2020).
[7] Case C-293/12, Digital Rights Ireland, judgment of 8 April 2014. See also the discussion in E Herlin-Karnell, *The Constitutional Structure of Europe's Area of Freedom, Security and Justice and the Right to Justification* (Hart publishing 2019), ch 4.
[8] Case C-362/14, *Data Protection Commissioner v Maximillian Schrem*s ECLI:EU:C:2015:650.

To the list of recent cases confirming the centrality of a high standard of EU data protection is the recent *Schrems II* case, making it clear that data protection is a mandatory precondition for the EU entering into agreements with third states.[9] In addition, the Court acknowledges that the reach of EU measures and data protection only applies to the EU territory. In the opinion of this author, it can only be hoped that comparative law, judicial and legislative, borrowing might spread this EU fundamental rights value of data protection. Opinion 1/15 is also interesting here as an affirmation of the strong focus on data protection in the Court. In this case the Court annulled a pending Agreement between Canada and the EU on the transfer and processing of Passenger Name Record (PNR) data.[10] The Court held that the Agreement granted too sweeping a purpose of fighting terrorism without concrete justification in the individual case just simply a general concern of public security and without respecting private life and data protection (Articles 7 and 8 of the Charter, Article 16 TFEU) and proportionality (Article 52 of the Charter). The PNR Agreement would have permitted data retention for up to five years.[11] The Court specifically stated that the Agreement needs to limit the retention of passenger name record after departure to that of passengers in respect of whom there is objective evidence from which it may be inferred that they may present a risk in terms of the fight against terrorism.[12] Indeed, most of the recent cases on EU data protection cases concern the transferring of data to third countries, and the question of equivalent protection. Moreover, the proportionality test is crucial in these cases. The importance of proportionality reasoning was, of course, confirmed in the recent case of *Privacy International* affirming that mass surveillance without any justification or concrete suspicion presented, much in line with the *Digital Rights* case, mentioned above, is contrary to EU data protection as it does not stand the proportionality test.[13] Similarly, in the recent *La Quadrature du Net*, an obligation requiring the general and indiscriminate retention of traffic and location data is incompatible with the Charter. [14] In both cases the Court emphasized that legislation which permits the general and indiscriminate transmission of data to public authorities entail general access and that national legislation requiring providers of electronic communications services to disclose traffic data and location data to the security and intelligence agencies by means of general and indiscriminate transmission exceeds the limits of what is strictly necessary and cannot be considered to be justified, within a democratic society.[15]

Accordingly, EU data protection of a very high standard in the EU, it is simply declared to be of fundamental importance. Yet what about the enforcement of EU data protection, i.e. when an EU Member State does comply with the fundamentals of data protection in the EU territory? Much of the debate on enforcement has been constructed around the possibility of Member States derogating from EU law and the possibility of national

[9] Case C-311/18, *Data Protection Commissioner v Maximillian Schrems (Schrems II*) EU:C:2020:559.
[10] Opinion 1/15 EU:C:2016:656.
[11] Paras 154–78.
[12] Para 232.
[13] Case C-623/17 *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others* EU:C:2020:790.
[14] Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net* EU:C:2020:791.
[15] The Court refers to Article 15(1) of Directive 2002/58, read in the light of Article 4(2) TEU and Articles 7, 8 and 11 and Article 52(1) of the Charter.

constitutional courts acting as a rebutter of EU law when national constitutional values are endangered which would be contrary to supremacy in classic EU law doctrine.[16] In this setting the debate is focused on the value of pluralism as well as on the constitutional structure of the EU.[17] There is also a well-known debate taking place currently on 'backsliding' – or regression – and the current challenges to the rule of law in certain EU Member States such as Poland and Hungary.[18] The EU has a well-known enforcement problem of course. But this could be remedied by a political willingness to implement EU law correctly, especially when EU law gives the individual a more far-reaching protection than national law, such as the case of the lack of adequate data protection in Sweden.

3 DEROGATIONS FROM THE GDPR?

In order to verify the above stated arguments, it is needed to look a bit more closely at the exceptions provided by the GDPR. First of all, the GDPR is based on Article 16 TFEU which means that the right to data protection is the norm. The Swedish state claims that it is free to derogate from the GDPR, as in certain circumstances the GDPR allows for national divergences such as respect for constitutional provisions, security concerns as well as journalistic freedom and freedom of expression. The derogation regarding the possibility of freedom of expression is to protect the freedom of the press and journalists. But the publishing licenses under discussion here, ('utgivarbevisen') are too general and applies to very different subjects. Both traditional journals and periodicals as well as to individuals and companies, in general, are subject to the same license.[19] Yet everything in connection with the licenses, do not concern press ethics and that of the freedom of journalists but about publishing information that is obtained from the Swedish authorities and then sold on or used to generate income from advertising ads. While newspapers and other media are under a strict editorial review and internal press ethics apply to them, the licenses (utgivarbevisen) are sold by the authorities to other stakeholders without much scrutiny who republish information on the internet. The state earns money from selling the licenses. How can that be freedom of expression? Regardless, the freedom to publish other persons private data must then be balanced against other rights, namely an individual's right to data protection, privacy and respect for their dignity and this balancing test is never done in Swedish practices.

Freedom of expression, safeguarded in inter alia Article 11 of the EU Charter, can be limited when democratic values are at stake. There are many examples of this in the ECHR framework.[20] As the Court pointed out in the *Schrems* 2 case, in order to satisfy the requirement of proportionality according to which derogations from and limitations on the

[16] *Costa v ENEL* C-6/64 ECLI:EU:C:1964:66.
[17] For this extensive debate see *eg.* the discussions in Armin von Bogdandy and Jürgen Bast (eds) *Principles of European Constitutional Law* (Oxford/Munich, Hart/Beck, Nomos, 2009), Mattias Kumm, 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly So Called' (2006) 54 *American Journal of Comparative Law*, 505, Matej Avbejil and Jan Komarek (eds) *Constitutional Pluralism in the European Union and Beyond* (Hart publishing 2012).
[18] See Laurent Pech and Kim Lane Scheppele "Illiberalism Within: Rule of Law Backsliding in the EU" (2017), 19 *Cambridge Yearbook of European Legal Studie*s 3-47 and see *eg.* Case C-619/18, *Commission v Poland* EU:C:2019:531.
[19] https://www.prv.se/sv/utgivningsbevis/varfor-utgivningsbevis/.
[20] https://www.coe.int/en/web/freedom-expression/freedom-of-expression-and-information-explanatory-memo.

protection of personal data must apply only in so far as is strictly necessary, the legislation in question which entails the interference must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards, so that the persons whose data has been transferred have sufficient guarantees to protect effectively their personal data against the risk of abuse.[21] The value of dignity is always at the heart of any discussions of what derogations are permissible. For Dworkin, for example, human dignity is an organising idea, as it brings ethical principles under the one roof of human dignity.[22] The question of data protection is surely also connected to this matter.

The GDPR can be restricted with regard for example the transparency and information obligation as regards processing and controlling of data. Article 23 GDPR stipulates that Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard. These restrictions concern, *inter alia*, national security, defence or public security other important objectives of general public interest of the Union or of a Member State including monetary, budgetary and taxation a matters, public health and social security. The notion of what is necessary and proportionate action in a democratic society is of crucial importance here.

Moreover, recital 153 of the GDPR is interesting here and states that:

> Member States law should reconcile the rules governing freedom of expression and information, including journalistic, academic, artistic and or literary expression with the right to the protection of personal data pursuant to this Regulation. The processing of personal data solely for journalistic purposes, or for the purposes of academic, artistic or literary expression should be subject to derogations or exemptions from certain provisions of this Regulation if necessary to reconcile the right to the protection of personal data with the right to freedom of expression and information, as enshrined in Article 11 of the Charter. This should apply in particular to the processing of personal data in the audiovisual field and in news archives and press libraries. Therefore, Member States should adopt legislative measures which lay down the exemptions and derogations necessary for the purpose of balancing those fundamental rights. Member States should adopt such exemptions and derogations on general principles, the rights of the data subject, the controller and the processor, the transfer of personal data to third countries or international organisations, the independent supervisory authorities, cooperation and consistency, and specific data-processing situations. Where such exemptions or derogations differ from one Member State to another, the law of the Member State to which the controller is subject should apply. In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly.

Also, Article 83 of the GDPR stipulates that:

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[21] *Schrems II* (n 9).
[22] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011).

> For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for exemptions or derogations [...] if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information.

As we can see the derogations and restrictions in question are meant to maintain the highest possible standard in a Member States, not to lower the level of protection and any derogation has to be genuinely about the freedom of expression and information and it has to be proportionate. Presumably what is worth preserving is right to information about the state i.e. transparency rules and the standard of what is expected in and democracy in line with the rule of law. It is not about the horizontal dimension of a right to know everyone's private data and house address.

Related to this is the Commission's recent communication entitled 'Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition', charting the EU's progress on data protection the last two year. [23] In this document the Commission stipulates that*:*

> A specific challenge for national legislation is the reconciliation of the right to the protection of personal data with freedom of expression and information, and the proper balancing of these rights.[24]

In addition, the communication stresses that:

> [Some] national legislations lay down the principle of precedence of freedom of expression, whilst others lay down the precedence of the protection of personal data and exempt the application of data protection rules only in specific situations, such as where a person with public status is concerned. Finally, other Member States provide for a certain balancing by the legislator and/or or a case-by-case assessment as regards derogations from certain provisions of the GDPR.

The Commission points out that:

> Data protection rules (as well as their interpretation and application) should not affect the exercise of freedom of expression and information, for instance by creating a chilling effect or putting pressure on journalists to disclose their sources.

Moreover, the Commission argues that 'The reconciliation must be provided for by law, respect the essence of those fundamental rights, and be proportional and necessary (Article 52(1) of the Charter)'. Accordingly, the Swedish interpretation of the exceptions to the GDPR appears far too broad and there is no proportionality assessment at all. In other words, the exception as applied in Sweden, allows anyone who buys a license to be protected under freedom of expression and hereby to be granted an exception from the GDPR, without any proportionality assessment as to whether this contradicts the right to data protection. In other words, the classic balancing of rights is not done here. In practice the Swedish exception means that the data protection rules do not fully

[23] Communication from the Commission to the European Parliament and the Council "Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition - two years of application of the General Data Protection Regulation COM/2020/264 final.
[24] ibid.

apply in Sweden, as Swedish practices currently set aside EU data protection by allowing a very strange interpretation of the limits of freedom of expression. It is submitted that the Swedish derogation is not only disproportionate but that it goes against the whole idea of the GDPR and against loyalty, as it goes fundamentally against the protection personal data.[25] So ironically while trying to preserve national constitutional law, the derogation is unconstitutional. It deprives citizens of their constitutional right to effective data protection and respect for their dignity as guaranteed both by the EU and the Swedish constitution, Ch 2 *Regeringsformen (RF)* as well as the ECHR. After all any derogation from the GDPR must respect the essence of the fundamental rights and freedoms, and be a necessary and proportionate measure in a democratic society to safeguard a public interest.

4 THE PRINCIPLE OF PROPORTIONALITY

The question of derogations under EU law are of course connected to the principle of proportionality, as already discussed above. It may be useful to look at proportionality a bit more closely. Common grounds for derogations from EU law, are of course national security, national identity, public security, health, public policy to name a few of them but they all have to pass the proportionality test to count as a valid justification.[26]

Article 52 EU Charter makes it clear that any permissible derogations by Member States from EU law obligations as set out in the Charter, are contingent on proportionality. In other words, proportionality is a doubled edged sword: the same principle of proportionality is protecting individual rights in a positive sense can also be used to limits those rights.

Yet in the Swedish case, any proportionality assessment doesn't seem to stand the proportionality test, and most importantly –and curiously – has not even been done. The exercise would be simple. When it concerns companies or individuals that apply for and buy a license but where press ethics and the special media laws (e.g. responsibilities for the editor in chief) or journalistic freedom matters are not at stake, there has to be a consent from the individual in question before any private information (such as home address, date of birth etc. etc.) about an individual is posted online. The question is not really about freedom of expression here but about obtaining information about private individuals from authorities that does not have any public interest (and is available for anyone who asks for it and visits the authority) and re-publish it online. Therefore, if there is no consent at least there has to be a proportionality assessment, and a balance between a 'right' to buy information and publish it and that of an individual's right to private life, dignity and data protection according to EU law.

The importance of the principle of proportionality as an EU constitutional principle is a well-known. The assumption is that interference with EU law rights should be kept to a minimum, in which the test is to ascertain whether it has been manifestly disproportionate to interfere with these rights. The principle of proportionality is a multifaceted principle, both a legislative principle and a free movement principle. Furthermore, it is a general EU law principle of great constitutional importance. Clearly, the principle of proportionality can be viewed as pointing in the same direction as reasonableness. The CJEU will inquire as to

[25] For a recent analysis of derogations and the GDPR, see *eg.* Jef Ausloos, *The Right to Erasure in EU data protection law* (Oxford University Press 2020).
[26] Stephen Weatherill, *Law and values in the European Union*, (Oxford University Press 2016), ch 4.

whether the measure was suitable or appropriate to achieve the desired result or whether this could have been attained by a less onerous method. Proportionality is therefore a general review in EU law that is applicable to test the legality both of EU action, and of Member State action when the latter falls within the ambit of the Treaty.[27] Moreover, the individual plays an increasingly important role in the EU context. For example, Article 3 TFEU makes it clear that not only is the Union to aim to promote the well-being of its peoples, but it is also to offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured. This implies a balance not only vis-à-vis the EU and its Member States, but also between the individual and the EU.[28] The CJEU will inquire as to whether the measure was suitable or appropriate to achieve the desired result or whether this could have been attained by a less onerous method. The relationship between the EU and the Member States is often described in terms of balancing: the EU only has the powers allocated to it by the Member States. Nonetheless, pinning down these boundaries set by the proportionality principle is sometimes challenging, where proportionality has also formed the *leitmotiv* in European law in a more general sense. After all, it is also a general principle of EU law that has to be taken into account in all actions of EU law, such as the creation and management of the internal market, as well as the operation of the Treaty freedoms.

Furthermore, the Member States could invoke proportionality to derogate from the rights guaranteed in the Charter since Article 52 applies to all rights. The explanatory memorandum on the Charter confirms that these exceptions are based upon the Court's well-established case law, which shows that restrictions may be imposed on the exercise of fundamental rights. The explanatory notes also make it clear that the reference to the general interests recognised by the Union covers both the objectives mentioned in Article 3 TFEU and other interests protected by specific provisions of the Treaties provided that those restrictions do, in fact, correspond to objectives of general interest of the EU. Moreover, these explanatory notes state that such restrictions may not, with regard to the aim pursued, be disproportionate or cause unreasonable interference which would undermine the very substance of any Charter rights.[29]

There is also an external dimension. In several recent cases such as *Digital Rights* and *Schrems 1 & 2*, the CJEU has stressed the EU's data protection rules cannot be derogated from without any justification. The proportionality review and the need to secure equivalent protection of data protection in cooperation with third states is interesting in the Swedish case. When data is published online it also become a global question as the data is available to third countries also. From this perspective it could be argued that actually EU data protection rules are not complied with when it comes to the importance of upholding EU standards with regard to third states. Therefore, it could be questioned whether data protection in the EU is not lived up with vis-à-vis third countries.

[27] Paul Craig *EU Administrative Law* (Oxford University Press 2012).
[28] Craig ibid chs 19–20, for an extensive overview of the notion of proportionality in EU law, Stephen Weatherill, *Law and Values in the European Union* (Oxford University Press, 2016).
[29] The Explanations relating to the Charter of Fundamental Rights, [2007] OJ C83/2.

5 HINDERING MARKET ACCESS?

Now the final issue I would like to briefly address is that of the familiar internal market dimension and that of market access. If only private data regarding private life, earnings, status etc. are available online for those registered and living in Sweden, it could be argued that it puts Swedes at a disadvantage when using their free movement right to conduct business. Another interesting aspect here is the link between the commerce in personal data has become the subject of trade and where undertakings compete to obtain and process this data. It has been suggested that this rivalry falls within the sphere of competition law.[30] In other words, the Swedish system may face more challenges than that of data protection.

6 CONCLUSION – THE SWEDISH SYSTEM NEEDS TO CHANGE

The right to data protection should not be set aside because of a disproportionate reading of the GDPR and the derogations, as the Swedish derogation at this moment is contrary to the idea of the Regulation. Besides, this is secondary legislation and the rights to data protection, dignity and privacy are Treaty based primary rights. There should be a uniform application of EU data protection rules in the EU so that all EU citizens are guaranteed the same level of protection. Moreover, there needs to be a proportionality assessment of the Swedish derogation as well as an examination of the true justification, i.e. if the state wants to earn money from selling the information or whether it is really about freedom of expression. In any event as is well known from both EU and ECHR case law, if there is a conflict of rights, there needs to be balance between those rights. It seems utterly wrong that if you are a publisher you have many constraints regarding what you can publish and you have to observe press ethics, but if you buy a license you can do what you want and breach EU data protection laws while the state earns money from it. The Commission ought to bring an infringement procedure against Sweden for breach of EU data protection rules.

[30] Xavier Groussot & Anna Zemskova 'The I-Rule of Law in the Making: a Constitutional Perspective on the GDPR', 2020 Sep 12, 8 p. *EU Law Live*. See also Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2015).

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REVIEW ESSAY

ROBERT LECOURT AND *SUI GENERIS* EU LAW

William Phelan, *Great Judgments of the European Court of Justice – Rethinking the Landmark Decisions of the Foundational Period,* Cambridge University Press 2019, 258 pages. ISBN 978110849908-8

XAVIER GROUSSOT*

1 INTRODUCTION

This is a great and original book written by William Phelan who revisits and rethinks the seminal decisions from the European Court of Justice of the early years (1961-1979). The book brings a new understanding and a new thinking as to the foundations of EU law. Importantly, it develops an argumentation on the origins of direct effect, which is both convincing and disruptive. After reading the book, it is difficult to avoid recognizing the crucial role of Robert Lecourt and the concept of self-defence in the landmark decisions of the foundational period. This book helps us to better understand many aspects of the byzantine architecture of EU law. The book provides, in that sense, an in-depth understanding of the connection between the end of the old international legal order and the creation of the new EU legal order. It also helps us to understand the cradle of the doctrine of individual rights in Europe and to reflect on the meaning of the *sui generis* legal order and the existence as well of a *sui generis* constitution. Because a sui generis legal order can only give birth to a sui generis constitution. In previous writings, William Phelan has already discussed in depth the sui generis nature of the European Union as '*un objet politique non-identifié*'[1] and the role of the legal philosophy of Robert Lecourt on EU Law.[2]

In this review essay, I will preliminarily look at the aim and structure of the book. Then I will engage on three topics directly (my first two points) and indirectly (my last point) connected to the book. First, by looking at the monumental impact of Robert Lecourt on EU law. Second, by discussing the importance of safeguards and self-defence on the 'Community logic' ('*logique communautaire*'). Third by having a short reflexion on the years

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[1] William Phelan, 'What Is Sui Generis About the European Union? Costly International Cooperation in a Self-Contained Regime' 14(3) International Studies Review (2012) 367. In this article, it is made reference to the iconic statement of Jacques Delors calling the European Union 'un objet politique non identifié'. It also refers to others that seems to agree by characterizing the European Union as *sui generis,* unique, new, exceptional, hybrid, and differing from both federal states and international organizations

[2] William Phelan, 'The Revolutionary Doctrines of European Law and the Legal Philosophy of Robert Lecourt', 28(3) EJIL (2017) 935, 945. For Phelan, the essential source for any understanding of Lecourt's legal philosophy before he joined the Court of Justice must be his dissertation on litigation in disputes over real. It is mentioned that the only previous discussion, in European law scholarship, of Lecourt's dissertation is a brief comment by Lindseth in Peter Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (2010) 140.

after the 'Lecourt years' (1977-2020) and the future of EU law in light of his philosophy and the current rule of law crisis in Europe. In other words, do we need a return to retaliation and self-defence when the rule of law is demolished and individual rights are flouted on a daily basis in Hungary and Poland?

2 AIM AND STRUCTURE OF THE BOOK

This book on the great judgments of the European Court of Justice is a great little book (around 250 pages). However, it is not a case-law book or a course book (though the main findings of the books should be integrated in our teaching of EU law). The book provides a focused argument on the development of EU law.[3] It is a stimulating and easy read, which is catching the reader attention from the beginning to the end. It is certainly one of the best books that I have read in 2020 (and I have read many books during this special Covid19 year!). The book is highly recommended. The book takes the view that the great judgments can be better understood both by comparisons with alternative means of enforcing trade-related Treaty obligations and through the writing of influential Judge Robert Lecourt.[4] This is the two key angles of the book and also its novelty. As to trade obligations, the book shows that the greatest innovations of the European legal order, including the new role for individual rights and national courts provided for by the doctrines of direct effect and supremacy, are directly linked to addressing the practical problem of how to effectively enforce trade obligations between states in an international treaty systems without making use of the mechanisms of safeguards and self-defence (retaliation).[5] As to Robert Lecourt, the book considers that the French judge, is the single individual that can claim the most profound influence on European Law.[6]

In a nutshell, the book shows the logical connection between the end of the use of the traditional international law enforcement mechanisms (such as safeguards and self-help) and the creation of the doctrine of individual rights erupting from *Van Gend en Loos* and *Costa* in the early years of European Law. Therefore, the book puts forward a new understanding of the purpose and impact of the great judgments of the Court of Justice in its most important and creative period.[7] For William Phelan, the conventional account of the great judgments fails to sufficiently engage with the essential distinctions between the European legal order and the enforcement and escape system commonly employed in other international systems.[8] There is a lack of discussion of how these new individual rights and roles for national courts were connected to important international collective action problems and inter-state relationships.[9]

The book is divided into ten Chapters. The first nine Chapters focus on nine seminal judgements of the European Court of Justice and the last Chapter (Chapter 10) discusses

[3] See *Great Judgments* 10.
[4] See *Great Judgments* 53.
[5] See *Great Judgments* 3.
[6] See *Great Judgments* 39. Other influential persons are also mentioned such as judge Nicola Catalano and legal attaché (legal secretary) Paolo Gori.
[7] See *Great Judgments* 3.
[8] See *Great Judgments* 222.
[9] ibid.

and concludes on the link between States and individual in the great judgements. Here comes a summary of the first nine chapters and their respective titles:

Chapter 1 Pork Products, 1961 – No Unilateral Safeguards
Chapter 2 Van Gend en Loos, 1963 – Direct Effect
Chapter 3 Costa v. Enel, 1964 – Supremacy
Chapter 4 Dairy Products, 1964 – No Inter-State Retaliation
Chapter 5 International Fruit, 1972 – No Direct Effect for the GATT
Chapter 6 Van Duyn, 1974 – Direct Effect of Directives
Chapter 7 Simmental, 1978 – Obligations of 'Lower' National Courts
Chapter 8 Sheep Meat, 1979 – No Inter-state Retaliation Revisited
Chapter 9 Internationale Handelsgesellschaft, 1970 – Protection of Fundamental Rights

In Chapters 1 to 4, you will find the core of the thesis. In this part of the book, Phelan discusses two judgements (*Pork Products*, 1961 and *Dairy Products,* 1964) which according to him, while their importance has not always been well recognized, should be understood to have played a vital role in the construction of the European Legal order.[10] Robert Lecourt was sitting as a judge as of the ruling in *Van Gend en Loos,* where he is said to have played a major role in the creation of the doctrine of direct effect together with Judge Alberto Trabucchi, acting as *contrepoids* towards the more chilling attitude of the *juge rapporteur* and the President Andreas Donner.[11] It is also interesting to note that the second part (Chapters 5 to 9) of the book is ended by *Internationale Handelsgesellschaft*. This last case from 1970 is engaged with though *Simmenthal* and *Sheep Meat*, delivered later in 1978 and 1979. This is done probably to connect in a better way with the discussion in Chapter 10 on individual rights since *Internationale Handelsgesellschaft* is about the protection of fundamental rights in the European legal order. The creation of individual rights to be protected by national courts is directly related to European's law break with interstate retaliation. For the author, the market citizenship founded in *Van Gend en Loos* was an 'international collective action problem citizenship' a *Pork* and *Dairy* citizenship closely linked to the Court's pioneering decisions on safeguards and self-help.[12] Robert Lecourt is pictured has having the major role of this evolution and in the making of the *annus mirabilis* of the European Court of Justice.[13] For Phelan, Robert Lecourt (due to his background and notably his dissertation written in 1931) was well prepared to recognize the extraordinary potential of the direct effect doctrine to act as a substitute for the reciprocity principles of classical international law.[14]

3 ROBERT LECOURT AND HIS IMPACT ON EU LAW – MONUMENTAL

Robert Lecourt is a hero in many respects: He is both a hero of the French resistance and a hero of EU Law and its *logique communautaire.* And as any hero, there is a certain degree of

[10] See *Great Judgments* 10.
[11] See *Great Judgments* 54-55.
[12] See *Great Judgments* 233.
[13] See *Great Judgments* 239.
[14] See *Great Judgment*s 240-241.

mysticism surrounding the person and more particularly around his writings since Lecourt have had his private affairs destroyed prior to his death.[15] It is thus difficult to trace his personal impact on the birth for the European legal order.[16] Before discussing his key writings, it is worth having a look at his curriculum vitae as it resorts from the curia website.[17] Before becoming a judge in Luxembourg in May 1962, Robert Lecourt had been an academic, a lawyer and a Member of the French government as minister. His dissertation is said to have played a major role in the building of his legal philosophy which has, in turn, influenced EU law. Lecourt became president of the European Court of Justice between October 1967 and October 1976. He died on 9 August 2004. For his *éloge funèbre,* Pierre Pescatore, another prominent judge who joined the Court of Justice in 1967, even spoke of the 'jurisprudential miracle' of the Court's 'Lecourt years' from 1962 onwards.[18] In the book, Robert Lecourt is described as extremely influential and 'one of the leading creators' and a comparison is made to Chief Justice Marshall in the US.[19] For Phelan, no other single judge has had such a profound influence on the development of European law, an influence that is imbued with 'left-leaning Catholicism'.[20]

Two major texts encapsulate the philosophy of Robert Lecourt. His dissertation from 1931: *'Nature juridique de l'action en réintégrande'*[21] and his book from 1976 on the Community legal order: *L'Europe des juges.*[22] In his dissertation, which is written in the very institutionalist inter-war period, Robert Lecourt discussed litigation in disputes over real property. The dissertation was completed at the University of Caen in 1931.[23] A text of Phelan published in 2012 on *sui generis* European law deals in detail with the impact of his dissertation on the judge's thinking.

Two passages are worth quoting here available in his article from 2012:[24]

> Lecourt's contribution to scholarship on the réintégrande, therefore, was to contest the scholarly consensus that it should be understood as a mechanism to protect the true possessors of a property and to declare instead that it was a creation of the courts to prevent public order being undermined by those who would take the law into their own hands. This contribution was acknowledged in later French legal scholarship, with Élisabeth Michelet in 1973, for example, attributing to Lecourt

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[15] See *Great Judgments* 5.
[16] ibid.
[17] See www.curia.eu: 'Born on 19 September 1908; French national; Doctor of Laws; Avocat at the cour d'appel de Paris (Court of Appeal, Paris); reserve captain; Member of the Underground Management Committee of the movement 'Résistance' and member of the National Liberation Movement; Member of the Provisional Consultative Assembly; deputy for Paris (1945-58); deputy for Hautes-Alpes (November 1958); Minister for Justice (on several occasions between 1948 and 1958); Minister responsible for aid and cooperation between France and the Member States of the Community, subsequently for the overseas départements and territories and the Sahara (January 1959-August 1961); Member of the Executive Committee of the European Movement; Judge at the Court of Justice from 18 May 1962 to 9 October 1967, President from 10 October 1967 to 25 October 1976; died on 9 August 2004'.
[18] Pierre Pescatore, 'Robert Lecourt (1908–2004): Eloge funèbre prononcé par Pierre Pescatore ancien Juge de la Cour, à l'audience solennelle du 7 mars 2005', Revue trimestrielle de droit européen (2005/3) 589, 595.
[19] See *Great Judgments* 5.
[20] See *Great Judgments* 239.
[21] Robert Lecourt, *Nature juridique de l'action en réintégrande: étude de la jurisprudence française* (1931).
[22] Robert Lecourt, *L'Europe des juges*, (Bruylant, 1976).
[23] See *Revolutionary Doctrines* 945.
[24] See *Great Judgments* 7.

> the view that *'la réintégrande est fondée sur le principe qu'il est interdit de se faire justice à soi-même*.[25]

And…

> Lecourt had therefore managed to work his way from a discussion of property disputes between country neighbours to a perspective on some of the greatest challenges of international law. Not for Lecourt the commonplace discussions of international lawyers that self-help countermeasures are a necessary 'fact of life' that serve a vital function in encouraging treaty partners to fulfil their legal obligations or, indeed, any recognition that self-help, even of a tempered and regulated variety, must of necessity continue to play a larger role in international than domestic society. Lecourt declared simply that states in international organizations must give up the use of violence and self-help just as individuals are forced to do before the law within a state, mirroring the ability of developing nation-states to put an end to self-help behaviours within their own territories.[26]

His dissertation, therefore, puts the basis of the two key precepts entrenched in the Court of Justice case law after *Pork Products,* delivered in 1961 (30 years after his dissertation!): the end of violence or self-defence and the need to rely on the judiciary control (through the national courts and the European Court of Justice in the Community law context) to prevent violence. The other crucial text of Robert Lecourt is his most famous book: *l'Europe des juges* (1976). This book constitutes a symphony to the 'Community logic'. It clearly aimed at popularizing European law among lawyers. This text is also rightly described as bland and as avoiding theoretical debates by Phelan.[27] Nonetheless, it does reflect in depth the legal philosophy of the French star judge. As Robert Lecourt wrote in *l'Europe des juges,* '[w]hen the individual applies to a judge to ensure that their treaty rights are recognized, they are not acting in their own interest alone, but by this behaviour the individual becomes a type of auxiliary agent of the Community'.[28] *L'Europe des juges* was described by Henri Schermers in his book review in Common Market Law Review in 1977 as a true monument of EU law, and particularly of the role of the judge in the European legal order.[29] He even recommended all the non-readers of Common Market Law Review to read it. This in order to learn about the application of the 'Community logic'.[30] For Schermers two conclusions of the book are paradigmatic. First, *l'Europe des juges* has been realised within a 'record time' ('*délai record*').[31] Second, since judicial Europe has been made, it is now time to build on its solid foundations.[32] In 1979, the European Court of Justice delivered its *Cassis de Dijon* ruling (Case 120/78) which will mark the start of the new era of mutual recognition and mutual trust in EU law.[33]

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[25] See *Great Judgments* 7 and *Revolutionary Doctrines* 947.
[26] See *Revolutionary Doctrines* 949.
[27] See *Great Judgments* 237.
[28] See Robert Lecourt, *L'Europe des juges* (n 22) 260.
[29] Henri Schermers, book review of *L'Europe des juges,* 14(2) Common Market Law Review (1977) 261-264.
[30] ibid.
[31] ibid.
[32] Robert Lecourt. *L'Europe des juges*, (n 22) 309.
[33] Case 129/78 *Cassis de Dijon* EU:1979:42.

4 SELF-DEFENCE, THE LEGACY OF *DAIRY PRODUCTS* AND THE *LOGIQUE COMMUNAUTAIRE*

The legacy of *Dairy Products* is enormous. In this case, the two Member States (Belgium and Luxembourg) argued that international law allows a party, injured by the failure of another party to perform its obligations, to withhold performance of its own. The European Court of Justice did not sustain the claim and ruled that, '[t]he basic concept of the treaty requires that the Member States not take the law into their own hands. Therefore, the fact that the [other party] failed to carry out its obligations cannot relieve the defendants from carrying out theirs'.[34] Both Pierre Pescatore[35] and Joseph Weiler[36] have expressed the view that the European legal order is a self-contained regime with no use of state responsibility in the classical sense of international law. This order has become something 'new' due to the prohibition of reciprocity and countermeasures. [37] As put by Phelan in a text from 2012, 'the concept of a "self-contained regime", developed in international legal scholarship, is used here to characterize the sui generis nature of the EU as a treaty agreement that imposes costs on organized interests within the Member States but rejects the use of inter-state reciprocity and countermeasures as enforcement mechanisms'.[38] In his words, '[a]pproaching the question of the sui generis nature of the EU through the discussion of its rejection of common ways of addressing international collective action problems in trade politics…helps to identify the puzzle that the EU poses to international relations scholarship'.[39]

The end of recourse to unilateral safeguards (*Pork products*),[40] the logic of direct effect (*Van Gend en Loos*) and the logic of supremacy (*Costa*) are all related to the stop of self-defence held by the Court of Justice in *Dairy Products*. In Phelan's book, it is clearly showed that the end of unilateral safeguards is the precursor of the end of self-defence. For him, direct effect should be understood as a substitute for inter-sate countermeasures or reciprocity mechanisms within the European legal order.[41] Also, relying on the writings of Lecourt, he underlines that Lecourt's explanation of the logic of supremacy in *Costa* is strongly connected with the Community law's prohibition of unilateral safeguards as set out by the Court in *Pork Products* and the Community law's prohibition of self-help.[42]

Phelan also relies on Lecourt's writing to demonstrate the importance of *Dairy products* on the *logique communautaire*. Notably, a brief article from 1965 on 'The Judicial Dynamic in the Building of Europe' appears to be crucial to understand the role of the end of the logic of self-defence on the s*ui generis* nature of EU Law.[43] In this article, Lecourt discussed together the *Van Gend*, *Costa* and *Dairy Products* triad as the seminal case law creating the new legal order. For Lecourt, it is the principle established in the *Dairy Products* that justifies the European Law doctrines of direct effect and supremacy, as well as the role they grant to

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[34] Cases 90/63 and 91/63 *Commission* v *Luxembourg and Belgium* EU:C:1964:80.
[35] Pierre Pescatore, *Droit International et Droit Communautaire, essai de refléxion comparative* (Nancy, 1969) 18.
[36] Joseph Weiler, 'The Transformation of Europe', 100 Yale Law Journal (1991) 2403, 2422.
[37] ibid.
[38] See *What Is Sui Generis about the European Union?* 369.
[39] See *What Is Sui Generis about the European Union?* 379.
[40] See *Great Judgements* 27.
[41] See *Great Judgments* 43.
[42] See *Great Judgements* 82-83.
[43] See *Great Judgements* 114-115; see also Robert Lecourt 'La Dynamique Judiciaire dans l'Édification de l'Europe', 64 France Forum (1965) 20.

national courts and individuals in the enforcement of European law.[44] As put by the French judge, 'The Court was led to conduct a sort of x-ray analysis of the Treaties to discover the solution to certain legal cases'.[45] The result of this is that individuals can invoke a direct right to ensure the respect of the directly applicable provisions of the Treaties.[46]

After the delivery of *Dairy Products,* the book shows its constant influence on seminal cases such as *International Fruit* (1972), *Simmenthal* (1978) and *Sheep Meat* (1979). For Phelan in *International Frui*t, it is fundamentally because the GATT allows unilateral use of safeguards, derogations mechanisms and retaliatory suspension of obligations that the GATT should not receive direct effect. If the GATT had rejected both unilateral use of safeguards, derogations mechanisms and retaliatory suspension of obligations, the Court, would have allowed direct effect.[47] In a similar vein, the obligations of lower national court in *Simmenthal* is seen as a logical consequence of the role that the Community legal order sought to create for national courts, that is to say to replace the role of inter-state retaliation.[48] The essential value of *Sheep Meat* is that it demonstrates that states benefiting from the Community legal order must be prepared to accept both the lack of direct consequences arising from the Article 169 (258 TFEU) and 170 (259 TFEU) procedures and the intermittent ineffectiveness of enforcement through direct effect.[49]

5 AFTER THE LECOURT YEARS (1977-2020)

What's left of the Lecourt years? As a preliminary point, it is interesting to note that Phelan's book discussed two cases of 1978 (*Simmenthal*) and 1979 (*Sheep Meat*) as the last great judgments of the Lecourt years. Robert Lecourt stopped to be judge at the European Court of Justice in October 1976, but his legacy is certainly present in these two judgments. It is also worth noting that the *Cassis* ruling was delivered in 1979, but it is not included in the book. Arguably, this seminal case marks the start of a new era: mutual trust. But perhaps the logic of mutual trust is also not so far in terms of reasoning from the original cases of the 1960s?

Mutual trust is the next 'civilised' and logical step after the end of retaliation.[50] The principle of mutual trust has the effect of tilting the balance between EU interests (free movement and cooperation) and Member State interests (protection of safety levels of various kinds) in favour of the former. However, it should be borne in mind that the principle, since being precisely a principle, may not be understood as absolute. Through the principle of mutual trust, the Member States could keep their own safety standards, but without these functioning as barriers to free movement or other cooperation. The Member States retain, to a certain degree, the option of referring to national safety standards if it is done in a proportionate manner (this is the so-called 'rule of reason' as established in *Cassis*).

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[44] See Robert Lecourt 'La Dynamique Judiciaire dans l'Édification de l'Europe', 20-22, see *Great Judgments* 116.
[45] See Robert Lecourt 'La Dynamique Judiciaire dans l'Édification de l'Europe' 21.
[46] See *Great Judgements* 7. In this part of book, Phelan stresses the important role of article 5 EEC Treaty and interestingly that this provision has often been downplayed or omitted in the doctrine commenting the founding judgments of the CJEU.
[47] See *Great Judgments* 149.
[48] See *Great Judgments* 183-184.
[49] See *Great Judgments* 196.
[50] See Xavier Groussot, Gunnar Thor Petursson, Henrik Wenander, 'Regulatory Trust in EU Free Movement Law: Adopting the Level of Protection of the Other?' 1(3) European Papers (2016) 865.

The rule of reason established in *Cassis* is also arguably strongly connected to the issue of limited Member States discretion when derogating from EU law. As mentioned in the book of Phelan, Paolo Gori in 1967 relied on *Pork Produ*cts case as the first example of the very strict approach adopted by the Court to allowing derogations from the fundamental rules of the Common market.[51]

Already in January 1977 with the *Bauhuis* judgment, three months only after the end of the Lecourt Presidency, the Court of Justice considered in the harmonized context of veterinary and health inspections that the system is based on the 'trust' the Member States should have towards each other.[52] The fundament for this mutual trust in EU law is the principle of loyalty, laid down in Article 4(3) TEU (ex Article 5 EEC, ex Article 10 EC). Based on this principle, the CJEU has repeatedly stated that the Member States need to trust each other in carrying out their respective duties under harmonized EU law. There is a clear connection between trust and the principle of cooperation. As rightly emphasised by Phelan, the principle of cooperation was already present in the core reasoning of the Court in both *Van Gend en Loos* and *Costa*, though the academic commentators never really lifted up its importance at this time.[53] The end of retaliation or self-defence in *Dairy Products* is not to be logically dissociated from the increase in cooperation due to the very existence of Article 5 EEC.

Mutual trust has spread rapidly after *Cassis* in both legislation and case law to become one of the core principles of EU law. *Opinion 2/13* and the *Achmea* case are remarkable examples of its fundamental importance in EU law to define the boundaries of 'autonomy' of the European legal order.[54] Koen Lenaerts, the President of the European Court of Justice, in his personal capacity, considered that the principle of mutual recognition is a constitutional principle that pervades the entire Area of Freedom, Security and Justice.[55] However, at the same time he acknowledged that the principle of mutual recognition has to be applied in light of the principle of proportionality. He also emphasised that the principle has to respect the margin of discretion left by the EU legislator to national authorities and that it must take into account national and European public-policy considerations.[56] It is true that that mutual trust is not blind, yet it is also true that the reliance on mutual trust to define and justify the autonomy of the EU legal order in the context of the present rule of law emergency has rendered it blind.[57] This is what we can call a 'blind autonomy'.[58] Mutual trust should not be relied on the present context by the European Court of Justice as a justification tool. This crisis of 'mutual trust' puts into jeopardy the whole structure of the *sui generis* European legal order and strongly shakes the cooperation between the Member States.

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[51] See *Great Judgment*s 27-29.
[52] Case 46/76 *Bauhuis,* EU:C:1977:6, para 22.
[53] See *Great Judgments* 76.
[54] Case C-284/16 *Achmea,* EU:C:2018:158.
[55] Koen Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice, The fourth annual Sir Jeremy Lever Lecture All Souls College, University of Oxford, 30 January 2015, www.law.ox.ac.uk.
[56] ibid.
[57] ibid.
[58] For a development on the concept of autonomy. See Xavier Groussot and Marja-Liisa Öberg, 'The Web of Autonomy in the EU Legal Order: An Analysis of Achmea and its Consequences', in Graham Butler and Ramses Wessel (eds.), *EU External Relations Law: The Cases in Context* (Hart Publishing, 2021, Forthcoming).

It also begs the question whether the potential end of a cooperation based on trust entail a return to self-defence. We have seen previously that with *Dairy Products* the Member States have renounced their ability to take self-help action to enforce their legal rights. Can the present situation lead to a return to the pre-*Pork Products* and *Dairy Products* situations? That is to say, a situation where States can rely on counter-measures within a Community legal order? This time, however, these counter-measures would be to taken to enforce respect of the rule of law in Europe, specifically targeting the autocratic Member States that are enthusiastically not only destroying the rule of law within their own countries, but also the entire European Union law. Drawing a parallel with the Lecourt years, which are described in the Phelan's book as *annus mirabilis*,[59] the present years marked by many crises can certainly be described, in contrast, as the a*nnus horibilis* of European law. This is so because the *sui generis* nature of the European legal is clearly put on trial. A trial that may call for the return to self-defence and thus a return to classic international law.

The signs are clear, unfortunately. The EU institutions are not able to rely effectively on procedure established by Article 7 TEU. The rule of law conditionality mechanism is not yet in place and perhaps will never be in place.[60] The European Commission has taken action against the autocratic States under Article 258 TFEU, but this it is not enough to stop the illiberal momentum. The only remaining legal availability is thus the recourse to Article 259 TFEU – a provision reminiscent of the old Community legal order, which has been used rarely (only eight times) and successfully only in six circumstances. It is easy to understand the lack of use of this provision since Article 259 TFEU goes against the very essence of cooperation and allows for retaliation. Yet, it is the only available means during this sad (and hopefully temporary) moment of mutual distrust.

Some years ago, Kim Lane Scheppele proposed the reliance on the direct action mechanism to deal with the limited effectiveness of financial sanctions and to subtract any EU funds, which the relevant Member State would be entitled to receive.[61] Dimitry Kochenov has proposed to take it a step further by applying what Scheppele proposed to the direct actions by Member States against other Member States. [62] This will free the potential of Article 259 TFEU allowing it to play an active role in the system by policing the values of the Union within defiant Member States.[63] Deploying this proposal will obviously entail modifying the present practice of (limited) application of Article 259 TFEU. But this can be deemed necessary in order to ensure that the whole *sui generis* architecture of EU legal order does not rumble due to the impossibility to sustain the key and essential values of European integration enshrined in Article 2 TEU.

On the 1st December 2020, the lower house of the Dutch parliament adopted a resolution requesting the government to start procedures against Hungary and Poland under

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[59] See *Great Judgment*s 5, 233.
[60] Doubts are still valid after the compromise reach on 10-11 December 2020 leading to a conditional 'rule of law conditionality', see for development (n 63).
[61] Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', in Carlos Closa and Dimitry Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2015). She focuses on how to empower the European Commission to intervene in the cases related to rule of law breach by 'systemic infringement procedure' thus leading to an effective application of Article 258 TFEU.
[62] Dimitry Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool´, December 2015 Hague Journal on the Rule of Law 7(2):153-174.
[63] ibid.

Article 259 TFEU for breaching the rule of law. Other Member States are certainly thinking to do the same thing. The ministry of justice of Poland is already speaking in terms of retaliation by suing the Netherlands for alleged tax malpractice. The wheels of retaliation are in motion for the better and for the worse (and certainly much more for the worse). Yet one thing remains sure, Hungary and Poland will be the great losers of this destructive game: 25 Member States against two Member States is not really a fair game, right?

If the (now accepted) 'rule of law conditionality system' (which is tied to the Covid19 rescue package)[64] and the potential 259 TFEU actions do not appease the situation by a quick return to a normal 'rule of law situation'; then countermeasures and retaliation[65] outside the field of EU law will have to be envisaged to impede Hungary and Poland to use Europe as a cash machine and at the same time violate our core fundamental values.[66] What would Robert Lecourt think of the current situation and the potential return to retaliation and self-defence in our *sui generis* EU law?

[64] On 10 and 11 December 2020, the European Council adopted conclusions on the MFF and Next Generation EU, COVID-19, climate change, security and external relations. Brussels, 11 December 2020 (EUCO 22/20). We are in a strange situation of conditional 'rule of law conditionality' where the European Council has breached the principle of institutional balance and has misuse the text of Article 15 TEU all this in order to reach a deal with Poland and Hungary. According to article 2 (c) of the conclusions: 'With a view to ensuring that these principles will be respected, the Commission intends to develop and adopt guidelines on the way it will apply the Regulation, including a methodology for carrying out its assessment. Such guidelines will be developed in close consultation with the Member States. Should an action for annulment be introduced with regard to the Regulation, the guidelines will be finalised after the judgment of the Court of Justice so as to incorporate any relevant elements stemming from such judgment. The Commission President will fully inform the European Council. Until such guidelines are finalised, the Commission will not propose measures under the Regulation'.

[65] If Poland and Hungary had blocked the process during the European Council, it would have been possible to create a rescue fund between the remaining 25 Member States based on international law.

[66] Poland is the in greatest beneficiary of EU funds with 124 billion euros granted since 2004 (See *Dagens Nyheter*, 9 December 2020).

BOOK REVIEW

Viktor Luszcz, *European Court Procedure, A Pratical Guide,* Hart Publishing 2020, 784 pages. ISBN: 9781841130538

Alezini Loxa*

Litigation before the Court of Justice of the European Union takes place following a procedure which has been developed on the basis of the EU Treaties, a significant amount of case-law produced in the nearly 70 years of the Court's existence and the rules of procedure of the Court of Justice and the General Court.

The post-Lisbon structure of the EU judiciary formation has been further complemented by the reform of the General Court. The transfer of jurisdiction from the Civil Service Tribunal, the increase in the number of judges and the new Rules of Procedure of the General Court adopted in 2015, create the need for practitioners to keep up with an ever-evolving landscape. Navigating through the different resources and materials which shape EU procedural law can be a complex endeavour even for those experienced in EU Law. This is part of the appeal of EU litigation.

This endeavour can now be supported by the work put together by Victor Luszcz in the recently published book *European Court Procedure, A Practical Guide*. The book is the result of extensive and meticulous work by legal secretaries (référendaires) and members of the Commission's Legal Service. Luszcz has worked on this book next to Alexandre Geulette, Viktor Bottka, Martin Farley, Milan Kristof and Vivien Terrien. Their insight in, and long engagement with, the Luxembourg Court has been central in providing them with the ability of outlining complex procedural matters in a comprehensive and informative manner.

The book is divided in five parts. Luszcz, provides an overview of the system of enforcement of EU law and the organisation of the Court of Justice of the European Union in the initial Part. Following, in Part 2, Kristof and Guelette elaborate on the procedure followed in infringement actions and preliminary rulings. Part 3 is authored by Luszcz, Bottka, Farley and Guelette and extensively presents the procedural elements and characteristics of the different legal avenues available for protection against EU acts. Then, Luszcz, Bottka, and Guelette proceed, in Part 4, by analysing the common procedure before EU courts as well as the special formal requirements in different types of actions. A final Part by Luszcz, Bottka, Farley and Terrien concludes with details on incidental and ancillary procedures, like interim procedures, interventions and costs, among other issues.

Overall, the book provides a comprehensive and detailed analysis of the procedural elements of EU litigation. Apart from the presentation of the EU Court procedure as it stands today, the text also points to where and when changes took place with respect to different procedures. What is more the book is enriched by extensive references to case-law. The case-law employed is not presented and analysed at length, as would be typical in most

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theoretical studies. Instead, this book aims at informing the reader on the current state of EU procedural law as it has been finally formed after years of legal dispute before the EU Courts. For this reason, the authors make references to all the cornerstone case-law (old and new) that has shaped EU procedural law, so the readers can then seek on their own more in-depth knowledge outside the realms of the specific procedural elements which each case gave rise to.

A significant advantage of the book lies in its format. Its detailed outline in connection with the choice of the authors to structure each section in short numbered paragraphs with clear and articulate titles make the book an excellent reference guide. The reader can effortlessly search through the book and find which part of it could be of help at each time due to the excellent classification.

The President of the General Court, Marc van der Woude, in the foreword of the book mentions that 'More than just another new theoretical study, this book really is a practical and useful tool that I sincerely recommend.' Indeed, the extensive work of the authors in examining and analysing a sizeable amount of case-law in light of its procedural value, along with its masterly presentation, make this book an excellent addition to the library of every practicing lawyer. The choice of outline and classification of different procedures and the intelligibility with respect to the procedural requirements of the different paths that could bring litigants to Luxembourg, add to the value of this contribution. They make it fit both for experienced practitioners and for lawyers who are just starting to engage in EU litigation and as a result, it could prove an indispensable addition to their libraries.

Finally, this book could also be used as a teaching material to provide a concise overview of the basics of EU procedure. This is so because it conclusively covers the developments of the case law with respect to judicial practice at EU level. As such, it could offer significant guidance to EU law students at early stages of their education.